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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

Number 667.

BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD,

Petitioners.

vs

TOLEDO, DELPHOS & BURLINGTON RAILROAD CO., ET. AL.,

Respondents.

Brief For Respondents

ON PETITION FOR WRIT OF CERTIORARI.

BROWN & GEDDES, Toledo, Ohio.
For Respondents,

CLARENCE BROWN,
Of Counsel.

TOLEDO LEGAL NEWS PRINT.

Supreme Court of The United States.

OCTOBER TERM, 1896.

The Bondholders and Purchasers of the Iron Railroad, *Petitioners*,	
vs.	No. 667
The Toledo, Delphos & Burlington Railroad Company, and The Toledo, Cincinnati & St. Louis Railroad Company, *Respondents.*	

BRIEF OF RESPONDENTS.

STATEMENT OF THE CASE.

This is a petition for a writ of *certiorari* requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to this court, for review and determination, a case heretofore pending in and decided by that Court. It is, in effect, an attempt to secure a review, by this court, of a decision of the Circuit Court of the United States for the District of Indiana refusing a rehearing, the Circuit Court of Appeals having dismissed an appeal therefrom.

The facts, so far as they relate to the case in the Circuit Court and the Court of Appeals, are few and simple; al-

though they do not appear to be so from the confusing statements and argument contained in the petition for the writ of *certiorari*, and the brief of counsel in support thereof. The confusion arises largely from the fact that counsel for the petitioners insist, as they always have, upon attempting to bring into this cause proceedings of courts in other jurisdictions, between other parties, and concerning other properties.

The record pertaining to these causes in the Seventh Circuit is as follows:

August 1, 1893, Grenville D. Braman, an unsecured judgment creditor of the Toledo, Cincinnati & St. Louis Railroad Company (formed in part by the consolidation of the respondents herein), filed a creditor's bill in the Circuit Court of the United States for the District of Indiana, seeking to subject the property of the consolidated Toledo, Cincinnati & St. Louis Railroad Company to the satisfaction of his judgment; and, upon his application, a receiver was appointed for the property of that railroad company in the Seventh Circuit. The receiver was directed to take possession of, maintain and operate the property and railroad of the Toledo, Cincinnati & St. Louis Railroad Company within the Seventh Circuit, and was clothed with all the authority usually given to a receiver by courts of equity in order to take charge of, care for and operate a railroad, and to collect and receive the tolls, incomes, issues, rents and profits thereof, and out of the same to maintain and keep the property safe and in good repair. (Rec 46-48).

The receiver so appointed took possession of the property of the consolidated Toledo, Cincinnati & St. Louis Railroad Company, in the Seventh Circuit under this judgment cred-

itor's bill, and continued to operate the same as an entirety thereunder until after the sale of the mortgaged premises on December 30, 1885.

The Braman bill was never filed in the Southern District of Ohio and the judgment creditors receivership was never created or recognized in that district. (Rec. 7.)

There was no consolidated or blanket mortgage covering, or purporting to cover the property of the consolidated Toledo, Cincinnati & St. Louis Railroad Company; nor was there any mortgage purporting to cover more than one of the mortgage divisions. There were eight divisional mortgages executed prior to the consolidation. (Rec. 6.)

Simultaneously with the filing of the creditor's bill by Braman, in the Seventh Circuit, and at the time of his application for a receiver, certain bondholders of the Iron Railroad Company appeared by their counsel, John C. Coombs, and filed a petition asking leave to appear and set forth certain equities claimed to exist in favor of the Iron Railroad. (Rec. 7.)

No specific claim on behalf of the Iron Railroad was then presented, and no special equities were established or recognized.

On the following day, in the order appointing the receiver, it was provided that "power and authority are hereby reserved to any party interested in any one of the constituent companies out of which the consolidated company was formed, to apply to the court for a direction to the receiver to keep an account of the receipts and expenditures of such constituent company, so as to preserve and secure any special equities which the court might find to exist in favor of such constituent company, and all other matters not

included in this order are reserved for the future consideration of the court. (Rec. 47-48.)

The Iron Railroad Company was one of the constituent companies of the consolidated Toledo, Cincinnati & St. Louis Railroad Company. Its property was subject to mortgage at the time of its consolidation. No mortgage had been placed thereon by the consolidated company. It was a short line of road situated wholly in Lawrence county, Ohio, and therefore wholly within the Sixth Circuit and in the Southern District of Ohio. It had no property in the Seventh Circuit. The receiver of the Toledo, Cincinnati & St. Louis Railroad Company appointed in the Seventh Circuit had no authority to take possession of the Iron Railroad under his appointment as receiver by that court, and did not, in fact, take possession of the same by virtue thereof. (Rec. 70-71.)

That part of the Toledo, Cincinnati & St. Louis Railroad extending from Toledo, Ohio, to East St. Louis, Illinois, was commonly known as the "Main Line." The division of the Main Line extending from Toledo, Ohio, to Kokomo, Indiana—upon which a mortgage had been placed by the Toledo, Delphos & Burlington Railroad Company prior to the consolidation—was known as the "Toledo Division." The division of the Main Line extending from Kokomo, Indiana, to East St. Louis, Illinois,—upon which a mortgage had been placed by the divisional Toledo, Cincinnati & St. Louis Railroad Company of Indiana and Illinois—was known as the "St. Louis Division."

After the appointment of the receiver in the judgment creditor's suit an action was brought by The Central Trust Company of New York, as trustee, to foreclose the mortgage

upon the Toledo Division, which cause is entitled The Central Trust Company of New York vs. Toledo, Delphos & Burlington Railroad Company, et al, and was known as Cause No. 7706, in Chancery in the United States Circuit Court for the District of Indiana. (Rec. 5-10.)

About the same time Edward F. Leonard, a holder of bonds secured by the mortgage on the St. Louis Division, brought an action to foreclose the mortgage upon that division, and the Central Trust Company of New York, as trustee, under the St. Louis Division mortgage, also brought a similar action to foreclose its mortgage. These two actions were consolidated, and were thereafter entitled The Central Trust Company of New York, Edward F. Leonard, et al, vs. Toledo, Cincinnati & St. Louis Railroad Company, and were numbered 7814 and 7815, Consolidated Causes, in the Circuit Court of the United States for the District of Indiana. (Rec. 5 10.)

No orders were entered in these causes appointing a new or additional receiver. The receivership already existing under the judgment creditor's bill was extended to, and adpoted in, the actions brought by the trustees for the foreclosure of the divisional mortgages. (Rec. 13, 14.)

Thereafter the receiver continued to operate the property as a unit, without distinction as to the mortgage divisions. The receiver himself testified that he operated the whole system "as an entirety under the various orders in the cases in which I was appointed receiver. * * * * * I have not paid any attention to the division into constituent parts in operating—I could not do so in practical working of the road." (Rec. 117.)

The judgment creditor's receivership was always recog-

nized in the Seventh Circuit, and was continued up to the sale of the property and the discharge of the receiver. That receivership was extended to the mortgage foreclosure suits so as to retain beyond question the jurisdiction of that court, and to charge the property in the receiver's possession with the result of the court's administration. Not only was no distinction made by the receiver, but no distinction was made by the courts in the Seventh Circuit between the mortgage divisions. The record discloses no order for treating the property otherwise than as a single consolidated property, operated as an entirety to preserve its continuity.

From the petition and record it would appear that such distinction had been made, and that an order to that effect had been entered. (Rec. 46, 49, 51,—Petition 5 6.)

But attention is respectfully called to the facts as disclosed by the record in that regard. The application of the bondholders of the Iron Railroad, which counsel for petitioner appear to claim was made under and in pursuance of the "right reserved to any party in interest in any of the constituent companies to apply to the Court for direction to the receiver to keep separate accounts, so as to preserve any special equities which the Court might find to exist in favor of any constituent company," was in fact made *before* that order was entered.

The petition of the bondholders of the Iron Railroad was filed at the time the application was made for the appointment of a receiver, namely, on the first day of August, 1883 (Rec. 51), while the order of the Court, which practically refused to recognize the equities claimed by the bondholders of the Iron Railroad and simply gave them leave

thereafter to petition, was entered on this very petition, namely on the second day of August, 1883. (Rec. 48.)

And the order, which counsel for petitioners in their petition for writ of *certiorari* say was "thereupon" (that is, upon their petition) entered, was, in fact, not entered upon their petition at all, nor in any court in the Seventh Circuit; but, as appears from the order it self and the certificate thereto attached, was an order entered by Judge Welker at chambers in the Sixth Circuit, and in a case pending in the Northern District of Ohio, Western Division. (Rec. 51, 52.)

Moreover, the order, as it shows upon its face, in no manner related to the question raised by the petition of the Iron Railroad bondholders filed at Indianapolis, but related to a loan which was then and thereby authorized for the purpose of paying the June pay-roll of the corporation; and the receiver was ordered to "keep a separate account of the amount paid by him out of the said loan hereby authorized for wages and labor upon * * * said Iron Railroad." (Rec. 51, 52.)

It will also be seen that the order in question was only a "copy of a *portion* of an order entered upon the chancery order book of said court in the case therein entitled," (Rec. 52); and in no way relates to the petition of the Iron Railroad bondholders filed at Indianapolis, and in no way applies to or affects the question now under consideration.

The preliminary report of Jacob D. Cox, as special master, was filed in 1884, in certain of the cases pending in Indiana. (Rec. 66, 97.) A second report was made by him, but it does not appear that it was ever filed in any case pending in the Seventh Circuit. (Rec. 97.)

These reports are reports made in five cases pending in

the Southern District of Ohio, in none of which were these respondents parties. Those cases did not involve property situated in the Seventh Circuit; and the courts of the Sixth Circuit did not, and could not, by any orders of reference, reports of master or decrees of court, in the Sixth Circuit affect the property in the Seventh Circuit, or any issue, claim or controversy in the cases pending therein. As will be seen, the reports were addressed to, and made in pursuance of orders made by the United States Circuit Court for the *Southern District of Ohio*, Western Division. (Rec. 66, 103).

These reports refer to the claim of the bondholders of the Iron Railroad Company as "uncontested indebtedness of the receiver." It certainly was "uncontested indebtedness" before the Master so far as these respondents or the parties to the suits pending in the Seventh Circuit were concerned. At the time of the filing of those reports no such claim had been presented to any Court in the Seventh Circuit. No pleading had been filed and no notice given of any intention to make any such claim; and the parties to the suits in the Seventh Circuit had no notice that any such claim had been made or allowed until long after the filing of the reports at Indianapolis. Whatever effect, therefore, is to be given to these reports, so far as the claim of the Iron Railroad is concerned, must be based upon the reports as and when filed in the Seventh Circuit and the action of that Court on the same thereafter.

At the time of the filing of these reports there had been no intimation in any of the cases pending in Indiana that any such claim was to be made, and the record in these cases fails to disclose that at that time there was any order of reference entered in the causes pending

in the Seventh Circuit, which covered an investigation and report upon any such claim.

The claim of the Iron Railroad first formally appears in the courts of the Seventh Circuit on February 8, 1886, after the filing of the Master's report (Rec. 133-134). At that time the bondholders of that company, by John C. Coombs as purchaser and attorney, filed in the causes pending in the Seventh Circuit a petition in which they set out their claim for the net earnings alleged to be due from the other divisions of the consolidated Toledo, Cincinnati & St. Louis Railroad, as reported by Gov. Cox.

January 7, 1887, the final report of Jacob D. Cox, as special master, was filed in the Seventh Circuit, purporting to show the net earnings of the Iron Railroad during the time it was operated by a receiver appointed in the Southern District of Ohio.

The preliminary and final reports of the special master, and the petition of the bondholders and purchasers of the Iron Railroad show what portions of such claim were claimed to be chargeable to the Toledo & St. Louis divisions respectively.

The claim of the purchasers and bondholders of the Iron Railroad, first filed in the causes pending in the Circuit Court of the United States for the Seventh Circuit, Feb. 8, 1886, came on for hearing in that Court at the November term, 1886, namely, on the 16th day of April, 1887; and as to that claim it was decreed as follows:

"It is further ordered, adjudged and decreed that the claim of the Iron Railroad for $41,748.39, reported and allowed by Gov. Cox as special

master, be and the same is hereby rejected and disallowed. The exceptions now allowed to be filed to the master's report allowing said claim are hereby sustained, and it is finally ordered, adjudged and decreed that the said Iron Railroad and the purchasers thereof at foreclosure sale take nothing by said claim and proceedings thereunder, to which ruling in disallowing and rejecting said claim the purchasers of the Iron Railroad and the bondholders holding bonds secured by the first mortgage upon said Iron Railroad, here now except by leave of court granted, and they here now pray an appeal to the Supreme Court of the United States, which is granted, upon their giving bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States, for the Southern District of Ohio, Western Division." Rec. 206 and 7, paragraph 8).

From this decree no appeal was taken in the Seventh Circuit. No further proceedings were had by the purchasers and bondholders of the Iron Railroad, in either of the cases pending in Indiana, for two years and a half (five terms) thereafter, namely, until November 8, 1889, at which time a copy of a petition for rehearing filed in another court was allowed to be filled at Indianapolis. (Rec. 178). Subsequently, on February 29, 1892 an amended petition for rehearing was allowed to be filed. (Rec. 1).

To this petition a motion to strike from the files, and a general demurrer, were interposed. (Rec. 219,220). The demurrer was sustained, a rehearing was refused, and the petition for rehearing dismissed. (Rec. 221.)

From this decree an appeal was taken to the Court of Appeals for the Seventh Circuit, and, the cause having

been heard in that court, the appeal was dismissed. (Rec. 230.)

From the decree of the Court of Appeals the petitioner took an appeal to this Court, and the cause is now pending on appeal herein, as No. 167 of the October Term, 1896.

Conceding that the jurisdiction of the Court of Appeals was final, counsel now seek to obtain a review of the order denying the rehearing, by means of a writ of *certiorari*.

SUMMARY.

The foregoing are believed to constitute all the material facts disclosed by the record in this case, so far as they are relevant to the question at issue, or pertain to the cause wherein the decree in question was rendered, from which an appeal was attempted to be taken.

All the remainder of the voluminous record (but part of which has been printed), relates to other causes pending in other tribunals in other jurisdictions, and concerning other property, and is composed in large part of what others did, said and thought, and especially of what the learned counsel for the petitioners did and thought, and what they assume the judges and opposing counsel must have thought. (Rec. 1—45.)

The substantial facts, in brief, are:

(1.) The claim of the bondholders and purchasers of the Iron Railroad was filed in the case pending in the Seventh Circuit.

(2.) It was heard upon the averments of the petition and the reports of the master.

(3.) It was wholly rejected and disallowed by the Circuit Court.

(4.) From this decree no appeal was taken. No petition for rehearing thereon was filed until five terms after the decree became a finality.

(5.) The Circuit Court refused to grant a rehearing and dismissed the petition filed for that purpose.

(6.) From this last decree the petitioners attempted to appeal to the Circuit Court of Appeals; and

(7.) That appeal was dismissed.

BRIEF OF THE ARGUMENT.

JURISDICTION OF COURT OF APPEALS FINAL.

The jurisdiction of the Circuit Court of Appeals was final, whether the case in that court be treated as an appeal from an order refusing an application for a rehearing, or, as now contended, as an appeal from an order not involving the exercise of discretion, but dismissing a petition not timely filed.

It is clear that if the decree of the Circuit Court were simply a refusal to grant a rehearing on an application then pending, there can be no appeal from such a decree.

Steines v. Franklin Co., 14 Wall. 15.
Railway Co. v. Heck, 102 U. S., 120
Kennon v. Gilmer, 131 U. S. 22.
Roemer v. Bernheim, 132 U. S. 103.
Boesch v. Graff, 133 U. S. 697.
Trust Co. v Grant Locomotive Works, 135 U. S. 207

The original jurisdiction of the Circuit Court being founded upon diversity of citizenship, and dependent upon

the opposite parties to the suit being citizens of different states, the judgment of the Circuit Court of Appeals was final, and no appeal lies therefrom to this court. And this is true even if that Court dismissed the appeal upon the grounds claimed by counsel for petitioners in their brief.

26 Stat. 826, 828, Sec. 6.

This review by *certiorari* is sought upon the ground of securing uniformity of decision, and because, it is alleged, the decision of the Circuit Court of Appeals is in conflict with the decisions of this court and of other Circuit Courts of Appeal.

Decisions of the Court of Appeals are ordinarily final and conclusive between the parties. This court will require them to be certified for review and determination, under the provisions of the act establishing the Court of Appeals, only where questions of gravity and importance are involved. The creation of that court would only add to the complications and delay of litigation, if it were otherwise. While, as said by this court, in the interest of jurisprudence and uniformity of decision, provision has been made, under the act in question, for a review by the Supreme Court so as to avert diversity of judgments and guard against inadvertence of conclusion, such supervisory power will be exercised only in controversies involving weighty and serious matters.

In re Woods, 143 U. S., 202.

Lau Ow Bew's Case, 141 U. S. 583; 144 U. S. 47.

This power of the court to review by *certiorari* the decisions of the Court of Appeals, has been held to be a branch of this court's jurisdiction which should be exercised

sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And while many applications have been made for writs of *certiorari*, but few have been granted, and those only which involved grave questions of general interest.

Amer. Const. Co. v. Jacksonville Ry., 148 U. S., 372, 383.

While the fact that a Circuit Court of Appeals for one circuit has rendered a different judgment from that of the Circuit Court of Appeals for another Circuit, *under the same conditions*, may furnish ground for a *certiorari* on proper application. (Columbus Watch Co. v. Robbins, 148 U. S., 266), it has never been held that a *certiorari* will be granted merely because a Circuit Court of Appeals for one circuit has rendered a different judgment from a Circuit Court of Appeals of another circuit, *under different conditions;* nor because a Court of Appeals has differed from a Circuit Court.

The contention of the petitioners that the decision of the Circuit Court and of the Court of Appeals for the Seventh Circuit is in conflict with that of the Circuit Court for the Sixth Circuit is without foundation. So too is their contention that the Circuit Court for the Southern District of Ohio asserted exclusive jurisdiction of the Iron Railroad claim as a whole, and attempted to reestablish the same as against the properties in the Seventh Circuit.

This is clearly shown from the opinion of Mr. Justice Matthews as embodied in the letter to Judge Jackson, in which Justice Matthews said:

"I assume that the theory upon which the administration was had in the (this) circuit was that of separate receiverships for each division, and that it is too late now to question its correctness in point of law." (Rec. 172.)

That assumption was fully warranted by the facts so far as they related to the properties in the Southern District of Ohio. But Justice Matthews clearly recognized the limitations of his jurisdiction, and the different theories of administration, and in the same letter said:

"As to the cases in Indiana and Illinois, it must be left to Judge Gresham to decide upon what rule he will act. If he declines to make the allowance against the divisions within those states, the divisions in this circuit should only be charged with their proportions of the whole." (Rec. 173.)

Here was a plain recognition by Justice Matthews of what was too apparent to require assertion, namely that it was wholly beyond the power of that court either to set aside the decree already entered in the Seventh Circuit, or, if no such decree had been entered, to establish a claim against properties wholly without the jurisdiction of the courts of the Southern District of Ohio.

But what was true of the theory of administration in the Southern District of Ohio was not true of the administration in the Seventh Circuit. In the Southern District of Ohio no bill was ever filed against the Consolidated Company or to reach the consolidated property, either by a judgment creditor or any one else. Separate bills for foreclosure of divisional mortgages were filed in that district, and an independent receiver was appointed under each bill. The Receiver gave a separate bond, assumed a separate duty, and operated a separate property.

In the Seventh Circuit the situation was wholly different. There a judgment creditor of the Consolidated Company filed a creditor's bill against the Consolidated Company to reach the consolidated properties. He sought only to subject the property of the Consolidated Company to the payment of his judgment after satisfaction of prior mortgages and other liens. The Trustees under the divisional mortgages became parties, but the creditor's suit remained. The judgment creditors' receivership was merely extended to the suits instituted by the mortgagees, and the judgment creditor's receiver continued to operate the railroad as a whole. As stated by the receiver himself, the whole system was operated as an entirety, and the receiver paid no attention to the division into constituent parts in operating, for he could not do so in practical working of the road. (Rec. 117.)

The theory of administration, therefore, in the Seventh Circuit, instead of being, as it was in the Southern District of Ohio, an administration by separate receiverships for each mortgage division, was in fact a single receivership of the consolidated property, operated as a unite without reference to mortgage divisions.

It is true that, for the purposes of accounting and distribution of the proceeds of sale, certain liabilities were apportioned between the mortgage divisions on the basis of railroad mileage ; but this was a mere arbitrary apportionment of certain indebtedness, and no divisional operation of the properties was had with reference to the origin, character of destination of traffic, or the apportionment of operating expenses in their relation thereto. All the earnings of all the properties in the Seventh Circuit were applied to the

payment of operating expenses without distinction as to mortgage divisions. Each division was charged as part of the whole, and each contributed to the general earnings.

DECREE OF CIRCUIT COURT SIMPLY ORDER REFUSING REHEARING.

To avoid the effect of the final decree of the Circuit Court for the Seventh Circuit, which wholly rejected and disallowed the claim of the Iron Railroad, as filed in that court, counsel for the petitioners contend that the decree was "inadvertently entered in a court which had no jurisdiction, territorially, *in rem* or *in personam*;" that the decree "had been vacated as a nullity by the only court that had jurisdiction;" that it was "not valid * * * because not authorized by any pleadings"; and that it was 'not final * * * for it was not appealable there, and did not purport to touch the only question then pending." And it is insisted that the voluminous petition for rehearing, and the more voluminous amended petition for rehearing were not petitions for rehearing at all, and that the petitioners did not want to be reheard in a case that had already been heard and decided, but desired a rehearing in a case which had not then been heard, in a court which had acted without jurisdiction, and on a claim which was not presented by any pleadings. (Brief of Petitioners, pp. 4-6.)

The petitions in the Circuit Court were entitled, and were in fact, petitions for a rehearing. Unless they possess that character they are unknown and unnamed pleadings in equity practice. If, as is now contended, the Circuit Court of the Seventh Circuit had no jurisdiction, territorially, *in*

rem or *in personam*,—if the decree were a nullity—if it had already been vacated—if it were utterly invalid and void, because not authorized by any pleadings,—or if it were not final, because it did not touch the claim in the case—then it is difficult to understand why the learned counsel filed a petition for a rehearing in a court that had no jurisdiction, whose decree had already been vacated, on a claim which was not touched by the decree, and as against a decree which was not final or conclusive. If the decree did not touch the issues in the pleadings of the Iron Railroad, then it did not affect the claim of the Iron Railroad which was then pending. If the decree were absolutely null and void, then it was of no binding force or effect upon the petitioners, claim, and it could have been successfully attacked in any collateral proceeding. If the decree were neither final nor valid, and had already been set aside as utterly void by the only court which had jurisdiction, then there certainly remained no obstacle to the petitioners proceeding in the Circuit Court to have a final and valid adjudication upon their then pending claim. And if the Circuit Court for the Seventh Circuit was wholly without jurisdiction concerning the Iron Railroad claim, then no obstacle remained to the assertion of that claim in any court which possessed jurisdiction.

So that, upon the theory of the petitioners' brief, there never was any necessity for filing the original and amended petitions for rehearing, and there is no necessity for a review by a *certiorari*; for the decree complained of is, upon their contention, absolutely null and void, not conclusive of the issues raised by their pleadings, not final, and finally has been set aside and vacated. There is, therefore, no

obstacle to the presentation and prosecution of their claim in the Circuit Court. The court having been without jurisdiction, the decree having been vacated, and not being final, the judgment of the Circuit Court of Appeals could not impart jurisdiction, validity or finality. Upon their own showing, petitioners should be remitted to their remedy in the Circuit Court, in which, according to their theory, their claim is still pending undisturbed by hearing or adjudication.

APPLICATION TO CIRCUIT COURT WAS FOR A REHEARING.

What was the object of the proceeding by the petitioners in the Circuit Court? It is said to have been "procedure for vacating or avoiding the bar of a decree" inadvertently entered in a court having no jurisdiction—"procedure for vacating or avoiding the bar of a decree" that had already been vacated as a nullity;—"procedure for vacating or avoiding the bar of a decree" that was not valid when entered, that was not final, and did not purport to touch the question on which the petitioners requested a rehearing. But why should petitioners deem it necessary to attempt the removal of an obstacle which they contend did not exist? Their position is, that, having a claim which had not been passed upon by the court, they filed two petitions for rehearing on a claim which had never been heard at all; that is to say, they petitioned the court to rehear a case for the reason that it had never heard it.

In the Circuit Court the pleadings were treated, both by the court and counsel, as what they were intended to be, namely, petitions for rehearing on the claim which had been passed upon by the decree of April 16, 1887. As

such a petition, it was heard, and the prayer thereof denied, and from that order there was no appeal. For that reason the appeal was dismissed by the Court of Appeals.

Speaking of this contention, the Circuit Court of Appeals said:

"This position is not tenable. Both by its averments and by its prayer it is clear that the petition was intended to be, and is just what it purports to be, a petition for a rehearing. It was not filed in time under Equity Rule 88 it is true; but equally for any other purpose than a rehearing, it has no standing or support. If, as contended, the decree was not final, there is, for that reason, no appeal from it; and if it was not valid or was absolutely null and void, or did not touch matters pending in the Seventh Circuit, then it is no obstacle to any procedure pending, or that might be instituted, for the establishment and enforcement of the claim of the appellants, and the appeal is unnecessary. *62 Fed. Rep., 169-70.* 10 C. C. A 319.

DECREE OF APRIL 16, 1887, "CLEVELAND DECREE," FINAL AND VALID.

It is contended that even if valid, the original decree of the Circuit Court was not final because it disallowed the entire claim, whereas the petitioners only sought to charge against the Toledo & St. Louis Divisions their proportionate part of the claim. But the petition of the bondholders and purchasers of the Iron Railroad set out the entire claim and sought to charge a portion thereof, specifically, upon the divisions located within the Seventh Circuit. The decree was that the claim as made by the Iron Railroad, and its bondholders and purchasers, against the properties in the Seventh Circuit be wholly "rejected and disallowed," and that they "take nothing by said claim and proceedings thereunder." (Rec. 206.) Manifestly the

decree of the court was limited to the claim asserted in that court and against the properties subject to the jurisdiction of that court. The meaning and effect of the decree was that the purchasers of the Iron Railroad "take nothing by said claim and proceeding thereon" as against the property within the jurisdiction of the court passing the decree. The claim as a whole, as presented by the petitioners, and as reported by the master, was rejected as against the divisions sought to be charged in the Seventh Circuit. Being rejected as a whole, of course all parts and subdivisions thereof, were likewise rejected.

It is urged that the degree was not final because it did not pass upon any issues presented by the pleadings in that cause, this upon the theory that the decree does not even mention the "petition and claim No. 69 a." But the claim of the petitioners, as set out in their petition, was rejected and disallowed, and that disposed of the claim without even mentioning the "petition and claim No. 69 a." The substantive fact is, the claim itself was disallowed, as appears from the decree, and any and all issues presented as to that claim by the only pleading on the file were, therefore, adjudicated. But, if, as contended, the decree rejecting and disallowing the Iron Railroad claim as a whole, still left the matter of its allowance of part of it against the divisions of that circuit open and undetermined, it is difficult to understand what obstacle exists to the calling up of the original petition and claim and having a hearing thereon.

It is not necessary to discuss the questions suggested by the record and petitioners' brief as to the form of the decree, and the procedure before the master and in the Circuit Court, prior to the rendition thereof. As said by

the Circuit Court of Appeals, "the grounds on which a rehearing was asked involve the correctness and regularity and not the validity of the decree." To review these questions an appeal should have been taken,-not from the refusal to grant a rehearing, but from the decree as originally entered.

Nor is it necessary to discuss what constitutes a final decree. The finality of the decree rejecting the claim of the bondholders and purchasers of the Iron Railroad is apparent upon its face. Unless it is absolutely void, because beyond the power of the court to make it, there can be no doubt as to its absolute finality against the claim of the bondholders and purchasers of the Iron Railroad so far as it relates to the property within the jurisdiction of the court which entered the decree. But it is not null and void. There was pending at that time the petition and claim of the bondholders and purchasers of the Iron Railroad seeking to recover from the proceeds of the sale of the property within the jurisdiction of the courts of the Seventh Circuit the *pro rata* part of the $41,748.39 net earnings alleged to be chargeable against the property in the Seventh Circuit. The validity of the claim so presented to the court was certainly a proper subject for adjudication. The court passed upon the same, upon the petition of the bondholders and purchasers of the Iron Railroad and the reports of the master, and finally rejected and disallowed it. The court had unquestionable jurisdiction of the subject matter and of the parties, and its decree formally entered after submission of the claim upon the pleadings and the evidence and after argument by counsel was certainly not void, even if erroneous.

The contention that the decree was void, or at least not final, because no appeal was allowed, or because the bond for the appeal was required to be "to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division," is scarcely entitled to serious consideration. The provision in the decree as to approval of bond is manifestly a clerical error, resulting from the preparation of two decrees at the same time. Section 1000 Revised Statutes prescribes by whom the bond shall be taken, and the court was without power to prescribe a different procedure for that purpose. The appeal was prayed and allowed in open court, and the petitioners might have proffered their bond to the proper authority, or perfected their appeal without giving bond, treating the provision as to its approval as mere surplusage or immaterial. They would thereafter have been allowed to give bond if objection for want of the same had been taken, without losing any of their rights upon the appeal. Provisions as to taking security are merely directory.

Martin v. Hunter, 1 Wheat., 304.
Davidson v. Lanier, 4 Wall., 447.
Seymour v. Freer, 5 Wall., 822.

The failure to take security, as provided in this section, is not jurisdictional, but is an irregularity, which may be subsequently cured.

Brown vs. McConnell, 124 U. S. 489.
Stewart vs. Masterson, 124 U. S. 493.

DECREE REFUSING REHEARING NOT DECREE ON MERITS.

As we understand the position of counsel for the peti-

tioners, they now concede that the petition for rehearing was not filed in time, and that the Circuit Court had no power, at the time the petition was filed, to grant a rehearing. But it is contended that a rehearing was granted by order of the court entered on the same day (Nov. 8, 1889), that the petition for rehearing was filed. (Rec. 178). No rehearing was granted, or intended to be granted, by the order of Nov. 8, 1889, as subsequent proceeding on the petition for rehearing before the Circuit Court clearly show, and as is also apparent from the statements contained in the amended petition for rehearing.

The parties were not present in Indianapolis Nov. 8, 1889, for the purpose of a hearing upon the petition for rehearing, for the reason that no petition for rehearing had at that time been filed in that court. But being present in court in other hearings, counsel for the bondholders and purchasers of the Iron Railroad, undertook to call up their petition for rehearing, when they learned, for the first time, that no such petition had been filed. They then asked leave to file a copy of the petition filed in the Sixth Circuit. Objection was made, but the court *allowed it to be filed.* The question being raised as to what notice should be given to counsel for the respondents, it was suggested by the court that as counsel were then present, no further notice need be given; that the court would allow the petition to be filed, and all counsel being present in court, their appearance might be shown of record and "said petition," i. e. the *petition for rehearing*, was set down for hearing on the thirteenth of January, 1890. The petition was accordingly filed and set down for hearing. Afterwards hear-

ings were had on the petition for a rehearing, but there was no rehearing upon the merits of the claim.

It being claimed, among other things, that to allow a rehearing would be inquitable, for the reason that other divisions having net earnings had not been allowed to recover for the same, and could not at that time have a recovery, a reference was had to ascertain these facts. A report having been filed, and the petition for rehearing coming on again to be heard, the petitioners took leave to amend. Subsequently the amended petition was filed and the demurrer and motion interposed

The Circuit Court did not grant, or intend to grant, a rehearing by its order of November 8, 1888. If such a rehearing had been granted, the court certainly would not have allowed additional hearings upon the petition for the purpose of ascertaining whether a rehearing should be granted; and it would not finally have refused a rehearing which it had already granted. It would have proceeded to rehear the case upon its merits, and either allow or reject the claim of the Iron Railroad.

IF REHEARING GRANTED, THE ORDER WAS VOID.

But even if the court, by its order of November 8, 1889, did undertake to grant a rehearing, that order was clearly void, for the reason that the court had, at that time, no power to grant such relief.

In *Roemer vs. Simon*, *91 U. S.*, *149*, it is said: "The court below cannot grant a rehearing after the term at which the final decree was rendered."

In *Lewisburg Bank vs. Sheffey*, *140 U. S.*, *445*, it is

said: "An application for rehearing made after the adjournment of the term at which the final decree was entered is made too late." And Mr. Chief Justice Fuller, in delivering the opinion of the court, remarked: "The application for rehearing was confessedly made after the adjournment of the May term, at which the prior decree was entered, and too late, if that decree was final:

And such is the general rule not only in the Circuit Courts, but in this court.

McMicken vs. Perin, 18 How. 507, 511.
Central Trust Co. vs. Grant Locomotive Works, 135 U. S. 207, 224.
Aetna Ins. Co. vs. Boon, 95 U. S., 117.
Schell vs. Dodge, 107 U. S. 629.
Easton vs. Ry. Co , 44 Fed. Rep. 7.
Morgan's etc. R. Co. vs. Texas Cent. R. Co., 32 Fed. Rep. 525.

In *Bronson vs. Schulten, 104 U. S., 410,* the general principle is thus stated:

"After the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, nullify or correct them, and if errors exist, they can only be corrected by such proceedings, by writ of error or appeal, as may be allowed in the court, which, by law, can review the decision."

Mr. Justice Miller, delivering the opinion in the case, said (p. 415):

"So strongly has this principle been upheld by this court, that while we realize that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the term at which the judgment was rendered, *and this is placed upon the ground that the case has passed beyond the control of the courts.*"

In *Glenn vs. Dimmock*, *43 Fed. Rep.*, *550*, Thayer J., said: "An order sustaining the petition for a rehearing after the lapse of the term next succeeding the entry of the final decree is void."

In *Central Trust Co. vs. Grant Locomotive Works*, *supra*, the same principle is announced. Decrees setting aside a former decree upon the merits, after the term at which the decree was entered, were set aside as void; and it was held that the Circuit Court had no power to set aside the original decrees either upon its own motion, or upon a petition for rehearing filed after the term.

PETITION FOR WRIT OF CERTIORARI AND BRIEF OF COUNSEL IN SUPPORT THEREOF.

Counsel for petitioners contend that in refusing a rehearing and dismissing the petition filed for that purpose, the Circuit Court did not exercise any discretion; that the question presented was simply a hard and fast question of law under Rule 88, and that the court dismissed the petition for want of jurisdiction. (Brief, p. 8.)

It is difficult to reconcile the conflicting claims of the petitioners. Upon the one hand, it is contended that "in the causes at bar the Circuit Court sustained the demurrer and dismissed the petition for assumed want of jurisdiction and power of the court to entertain a rehearing after the expiration of the term." (Brief p. 12-13.) On the other, it is contended that the court had exercised its discretion in the matter and had granted the rehearing and that no appeal is sought from that order made in the proper exercise of the court's discretion. (Brief, 8, 9, 10.)

The facts are, the court neither dismissed the petition for want of power to consider the same, nor granted the rehearing, afterwards dismissing the petition upon the merits. Two pleadings were filed to test the sufficiency of the petition: (1.) A motion to strike from the files, not printed in full, but referred to in the record (p. 219), upon the ground that the petition was not filed within rule; and (2) a general demurrer to the petition for want of equity.

The motion to strike from the files was not heard, but the demurrer was sustained. In other words, the court, for reasons to it sufficient, refused to grant the rehearing. The amended petition, as it clearly shows upon its face, involved the whole history of the litigation. It included everything that had ever been said or done by anybody, directly or remotely, referring or supposed to refer to the Iron Railroad claim. It not only undertook to include the action of all the courts, but the acts of the judges when not sitting, and the personal correspondence between counsel and the members of the court. It even went so far as to show what counsel "inferred" from the *silence* of the court. (Brief 17, 18.) But upon the consideration of that petition for rehearing and all the allegations therein contained, which the demurrer conceded to be true, the court, which had a personal knowledge of the case from the beginning, refused, after mature deliberation, to grant a rehearing. The consideration that the petition was not filed within rule may have had weight with the court, and many other considerations may have influenced its judgment; but the fact remains that upon consideration of all the matters brought forward by the petition for rehearing and the demurrer, the court denied the relief.

The petition was not disposed of upon the motion to strike from the files. The cause was submitted upon the petition and the demurrer, the demurrer was sustained, the petition dismissed, and the rehearing was, therefore, denied. (Rec. 221.)

It is said that the decree disallowing the Iron Railroad claim was not final and appealable in Indiana, and that "no appeal was allowed from it there." This is not in accordance with the facts. The decree entered in Indiana recites (Rec. 206), that such purchasers and bondholders in open court "prayed an appeal to the Supreme Court of the United States, which is granted upon their giving bond in the sum of one thousand dollars." True, such bond was to be to the approval of the Circuit Court of the United States for the Southern District of Ohio; but as before shown, that did not affect their right of appeal, nor deprive them of a full remedy in that respect. The statement on page 9 of the petition for a writ of *certiorari* "that the petitioners gave bond as required to the approval of the Southern District of Ohio" should be understood as referring only to the cases pending in that court. They gave no bond to perfect their appeal from the decree entered in the District of Indiana.

It is contended that the respondents herein appeared at the hearing upon the petition for rehearing in Cincinnati, and were heard in argument against the rehearing, thus recognizing that the Circuit Court of the United States for the Southern Dstrict of Ohio had exclusive jurisdiction of the claim of the Iron Railroad as against the properties in the Seventh Circuit. This contention is wholly at variance with the facts, as

is clearly apparent from the record. Touching this matter, the position of the respondents is clearly shown by the telegram from Colonel Ingersoll to Judge Jackson on this subject (Rec. 175, 176), wherein it is said:

"I have received notice * * * that an application will be made by the attorneys of the Iron Railroad Co. for some order that will affect the companies I represent. * * * As to the claim of the Iron Railroad, that was passed upon by yourself and Judge Gresham. All I want is that any question affecting the line of road from Toledo to St. Louis shall be passed upon by you and Judge Gresham, as originally agreed. If the questions presented do not affect the parties I represent, I have nothing to say. But if any order is to be made affecting in any way the property or liability of my clients, then I not only wish to be heard, but I wish to be heard before yourself and Judge Gresham. My clients have complied with all the orders made by you and Judge Gresham at Cleveland in every particular."

It is true that counsel for the respondents did appear at Cincinnati in pursuance of the notice requiring them to so appear; but they appeared solely for the purpose of objecting to the jurisdiction of that court and protesting against the exercise of any authority over their properties which were wholly without the jurisdiction of that court. Their position in that respect was sustained by Justice Matthews. The decree which was entered in accordance with his opinion, granting a rehearing in the Southern District of Ohio, and establishing the Iron Railroad claim against these divisions, expressly provides "that this decree does not warrant any enforcement or collection of said claim save in said causes numbered 3554, 3557, 3578, and 3579 (the Cincinnati cases), without the concurrence herein of the Circuit Courts of the United States for the District of Indiana and the District of Illinois." (Rec. 174, 175.)

As said in the Circuit Court of Appeals in its opinion: "To the extent of the jurisdiction of the court in Indiana over the subject and parties, that decree (the Cleveland decree), when entered there was a final disposition of the claim in both forms. The decree had its force not from anything done or agreed upon at Cleveland, or elsewhere in the Sixth Circuit, but by virtue of the power and jurisdiction of the courts which pronounced it; and the subsequent granting of a rehearing by the court at Cincinnati could have had no effect upon the decree in Indiana, even if the proviso to the contrary had been omitted from the Cincinnati decree." (62 Fed. Rep., 170.)

Throughout the petition for a writ of *certiorari* and the brief for the petitioners in support thereof, it is asserted that it is sought to enforce a hard rule to defeat "conceded rights," and that the claim of the Iron Railroad is an "admitted claim" and "undisputed indebtedness." The record of this case shows that the claim of the Iron Railroad as against the divisions in the Seventh Circuit has been opposed, and successfully resisted, since the day of the appointment of the receiver under the creditor's bill August 1, 1883. It has been successfully resisted in every court in the Seventh Circuit having jurisdiction of the properties. The courts of that circuit administered the property upon a theory which would not have permitted the establishment of this claim, while, at the same time, they disallowed claims of like character in favor of or against other mortgage divisions.

It is not thought necessary to further review the arguments and authorities in support of the contentions of counsel for petitioners; that "The Decree of January 20, 1893, was appealable; that "The Claim was never submitted to the

Jurisdiction of the Seventh Circuit;" that "The alleged Decree of April 16, 1887, was not final," and that "It was a mere Nullity." It is submitted that they have no application of the facts in this case. The simple proposition is: The claim of the Iron Railroad as presented to the Circuit Court for the District of Indiana was rejected and disallowed by a decree of the court, upon full hearing; a rehearing was denied; and from that order denying the rehearing the petitioners attempted to appeal.

Many facts are stated and many reasons are given by counsel for petitioners in their petition and brief which need not be noticed in detail. It may be said of them generally that they relate to proceedings in the courts of the Sixth Circuit with reference to property within the jurisdiction of those courts. Such proceedings could, in no way, affect the property in the Seventh Circuit, nor the rights of the parties to causes pending therein. Although the administrations of these properties in the two circuits under different receiverships was cotemporaneous, and, to some extent, connected, they were radically different, as has been shown. Whatever may have been the policy in the Sixth Circuit, no orders there entered could by any possibility affect, nor do they assume to affect, the property of these respondents in the Seventh Circuit. Therefore it is not considered necessary to enter into a detailed discussion of the character and effect of the proceedings in the Sixth Circuit.

The entire claim of the petitioners rests upon the assumption that the Circuit Court for the Southern District of Ohio had power, and assumed, to pass upon a claim pending in the Circuit Court for the District of Indiana. These respondents were not parties to the suits pending in the

Southern District of Ohio. They did not, and could not, resist the claim in that court, except that when notified to appear at hearing in that court, they protested against the jurisdiction of the court and were dismissed therefrom with the suggestion from Justice Matthews that that court would not assume to pass upon claims pending in the courts of the Seventh Circuit.

It seems useless to further argue the questions presented at length in the petition and brief of counsel for the petitioners. There is no conflict between the courts of the Sixth and Seventh Circuits. They did not pass upon the same question, or questions arising under the same circumstances and conditions. If, as now contended, the claim of the Iron Railroad was never submitted to the jurisdiction of the Seventh Circuit, or if the decree which rejected it was not final, or if that decree were a mere nullity, these facts only furnish additional reasons why the present proceeding should not be maintained.

TO ALLOW A REHEARING ON THE IRON RAILROAD CLAIM AT THIS LATE DAY WOULD BE INEQUITABLE.

Moreover, the allowance at this time of process which might result in a rehearing on the Iron Railroad claim would be grossly inequitable. Without undertaking to enter upon the consideration of the merits of the petitioner's claim, it would be unjust, at this late day,—thirteen years after the sale of the Ohio Divisions, and long after all the accounts have been closed, and after the records and papers have been lost or destroyed,—to open up questions of ac-

counting between the mortgage divisions, and reverse the theory upon which this property was administered by the courts of the Seventh Circuit. The bondholders of the Toledo and St. Louis Divisions, although originally contending that they were not chargeable with the debts created by the judgment creditor's receivership, and insisting that their properties should proceed to separate foreclosure under independent receiverships—were unsuccessful in that contention in the Seventh Circuit. All accounts have been closed, and all payments made, on the basis of a judgment creditor's receivership of a single property. To compel them to pay, as was done, upon that theory, and then, after payment, to change the entire theory of administration and compel them to pay the Iron Railroad, without affording them an opportunity to recover from those who might be liable to them upon the new theory, would be the perpetration of great injustice. As reported by one of the masters, it is now impossible to ascertain material facts for a new accounting owing to the loss and destruction of the books, accounts and papers. (Rec. 182.)

To allow proceedings resulting in a rehearing upon this claim is practically to allow the claim of the Iron Railroad; while claims of a similar character, based upon the same principle, were not allowed to other divisions, under like circumstances, either in favor of or against the properties in the Seventh Circuit. (Rec. 204 par. 4.)

The decision of the Court of Appeals in the case of the *Bondholders and Purchasers of the Iron Railroad vs. T. D. and B. R. R. et al is reported in*:

10 C. C. A. 319 and 62 Fed. Rep. 166.

It is respectfully submitted that the petition for a writ of *certiorari* should be denied.

TOLEDO, OHIO, February, 1897.

CLARENCE BROWN,
Solicitor for Respondents.

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Office Supreme Court, U. S.
FILED
APR 2 1897

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 769

JULIUS STROHEIM ET AL.,
Plaintiffs in Error,
vs.
RUDOLPH DEIMEL ET AL.,
Defendants in Error.

PETITION FOR CERTIORARI.

HIRAM T. GILBERT,
FOR PETITIONER.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

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Plaintiffs in Error,
vs.
RTDOLPH DEIMEL ET AL.,
Defendants in Error.

PETITION FOR CERTIORARI.

To the Honorable the Judges of the Supreme Court of the United States:

Your petitioner, Rudolph Deimel, of the County of Cook and State of Illinois, respectfully shows that in the month of February, A. D. 1890, Julius Stroheim and Salo J. Stroheim, then being citizens and residents of the State of New York, as plaintiffs, commenced in the Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois, their certain action on the case for deceit against one Joseph Deimel and your petitioner, who were then citizens and residents of the State of Illinois, as defendants, in which said action the plaintiffs did, on the 21st day of February A. D.

1890, duly file their declaration claiming damages of the defendants on account of certain alleged false representations claimed to have been made by the defendants for the purpose of deceiving the plaintiffs, to which declaration the defendants on the 5th day of March, A. D. 1890, duly filed in said court their plea, commonly called the plea of the general issue.

Your petitioner further says, that on the 28th day of March, A. D. 1894, a trial was had in said Circuit Court of the United States in said suit without a jury, before the Honorable ROMANZO BUNN, District Judge, then holding said Circuit Court, which trial thereafter on the 23d day of July, A. D. 1894, resulted in a final judgment in favor of the plaintiffs and against the defendants for the sum of Eight Thousand Five Hundred Dollars ($8,500) and costs of suit.

Your petitioner further shows, that on the 17th day of November, A. D. 1894, the plaintiffs in said suit sued out of said Circuit Court of the United States a writ of *capias ad satisfaciendum* upon said judgment, directed to the marshal of the Northern District of Illinois to execute, and under and by virtue of said writ of *capias ad satisfaciendum* said marshal did on the 20th day of November, A. D. 1894, arrest and take into his custody your petitioner, one of the defendants therein.

Your petitioner further says, that on the 21st day of November, A. D. 1894, your petitioner filed in said Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois his petition for a writ of *habeas corpus* to obtain his release and discharge from the said arrest so made by the said marshal, upon which said petition such proceedings were had, that on the same day a writ of *habeas corpus* was issued as

prayed for in said petition, under and in pursuance of which writ said marshal did on the 28th day of November, A. D. 1894, produce the body of your petitioner before said court, and thereupon said Circuit Court did on said day enter an order discharging said writ and remanding your petitioner to the custody of said marshal, from which said order your petitioner on the said day prayed for, obtained and perfected an appeal to the Circuit Court of Appeals of the United States in and for the Seventh Circuit, and by an order entered by said court, your petitioner was on said 28th day of November, A. D. 1894, enlarged, pending said appeal upon a recognizance in the sum of twelve thousand dollars ($12,000), duly entered into by your petitioner in the form and with the sureties approved by the said Circuit Court.

Your petitioner further says, that thereafter and within the time required by law, your petitioner caused a duly authenticated transcript of the record of said *habeas corpus* proceeding to be filed in the United States Circuit Court of Appeals for said Seventh Circuit, in which said court said appeal was duly heard, and such proceedings were had thereon that said Circuit Court of Appeals did on the 7th day of October, A. D. 1895, dismiss the appeal of your petitioner for said order of said Circuit Court discharging said writ of *habeas corpus* and remanding your petitioner to the custody of said marshal. And thereafter on tne 13th day of March, A. D. 1896, your petitioner duly surrendered himself to said marshal, and on the following day, to wit: on the 14th day of March, A. D. 1896, said marshal imprisoned and confined your petitioner under said writ of *capias ad satisfaciendum* in the county jail of Will county, in the State of Illinois, and there kept your petitioner so imprisoned and con-

fined until the 16th day of April, A. D. 1896, on which last mentioned date your petitioner was discharged from such imprisonment as hereinafter stated.

Your petitioner further says, that by sections 30 and 31 of chapter 72 of the Revised Statutes of Illinois of 1874, it is provided as follows:

"SEC. 30. In all cases where any person is committed to the jail of any county upon any writ (of) *capias ad respondendum* or *capias ad satisfaciendum* issued in any suit, it shall be the duty of the creditor in such writ to pay the keeper of the jail or sheriff his fees for receiving such person, and his board for one week at the time the debtor is committed to jail and before the jailer shall be bound to receive the debtor, and in default of such payment the debtor may be discharged, *provided*, the officer having such debtor in charge shall give reasonable notice to the creditor or his agent or attorney, if within the county, that such debtor is about to be committed to jail on such writ."

"SEC. 31. Should the debtor be detained in jail under such writ for more than one week, it shall be the duty of the creditor, at the commencement of each week, to advance to such jailer the board of the debtor for the succeeding week, and in default of such payment in advance, the debtor may be discharged by such jailer. In case the debtor shall not be detained in such jail for any week for which his board may have been paid in advance, the jailer shall return to the creditor, or his agent or attorney, the amount so advanced for and unexhausted in boarding."

Your petitioner further says, that on the 13th day of March, A. D. 1896, the plaintiffs in said writ of *capias ad satisfaciendum*, to wit: said Julius Stroheim and Salo J. Stroheim, through their attorneys, having been duly notified by said marshal that your petitioner was about to be committed to jail on said writ, paid or caused to be paid to said marshal the sum of Three Dollars and fifty cents ($3.50) as payment in advance to said marshal of

the board of your petitioner for the succeeding week; but that from said 13th day of March, A. D. 1896, down to the 23d day of March, A. D. 1896, the said plaintiffs in said writ of *capias ad satisfaciendum* did not, either by themselves, or either of them, or through their attorneys, or either of them, or through any other person, pay or cause to be paid, or tender, or cause to be tendered to said marshal, as aforesaid, or to the keeper of said county jail of Will county, or to any other person for them or for either of them, any money whatever for the board of your petitioner, but on the contrary so to do wholly failed and neglected.

Your petitioner further says, that on said 23d day of March, A. D. 1896, your petitioner caused demand to be made upon said marshal for the release of your petitioner from his said imprisonment, which said demand was refused by said marshal.

Your petitioner further says, that thereafter and on or about the 6th day of April, A. D. 1896, your petitioner presented to said Circuit Court his motion for a discharge from said imprisonment by said marshal under said writ of *capias ad satisfaciendum*, which said motion was based upon the ground that the plaintiffs in said writ had not complied with the provisions of said Sections 30 and 31, of Chapter 72, of the Revised Statutes of Illinois of 1874, as aforesaid, in this, that the said plaintiffs had not at the commencement of the second week of the imprisonment of your petitioner under said writ of *capias ad satisfaciendum* paid to said marshal the board of your petitioner for such succeeding week.

Your petitioner further says, that thereafter and on the 16th day of April, A. D. 1896, said motion having come on to be heard before the Hon. JOHN W. SHOWALTER,

one of the judges of said Circuit Court, an order was entered by said Circuit Court discharging your petitioner from said imprisonment under said writ of *capias ad satisfaciendum*, and your petitioner was thereupon discharged accordingly.

Your petitioner further says, that thereafter, to wit: on said 16th day of April, A. D. 1896, said Julius Stroheim and Salo J. Stroheim duly sued out their writ of error whereby the record in said suit was removed to the Circuit Court of Appeals of the United States for the Seventh Circuit, in which said last mentioned court such proceedings were had, that on the 11th day of January, A. D. 1897, a judgment was entered in said court reversing said order of said Circuit Court discharging your peititoner from imprisonment, and directing said Circuit Court to remand your petitioner to the custody of the jailer, to be held until discharged according to law.

Your petitioner further says that before the final hearing of said cause in said Circuit Court of Appeals, and on, to wit: the .... day of October, A. D. 1896, your petitioner entered in said court his motion to dismiss said writ of error for want of jurisdiction, which motion was based upon the ground that the order of said Circuit Court discharging your petitioner from said imprisonment was not a final decision of said Circuit Court within the meaning of Section 6 of the act establishing the Circuit Courts of Appeals, and which provides as follows:

"The Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Court, and the existing Circuit Courts, in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

Your petitioner further says, that thereafter, and on, to wit: the .... day of ....., A. D. 1896, said Circuit Court of Appeals overruled and denied the said motion of your petitioner to dismiss said writ of error for want of jurisdiction.

Your petitioner further says that, as will appear from the opinions delivered by the judges of said Circuit Court of Appeals, the majority of said judges based their judgment reversing said order of said Circuit Court upon the sole ground that your petitioner was not entitled to his discharge, because your petitioner had neglected or refused to schedule in manner and form as provided by said Chapter 72 of the Revised Statutes of Illinois of 1874, which requirement it was held by the judges of said Circuit Court of Appeals was imposed by Section 34 of Chapter 72 of the Revised Statutes of Illinois of 1874, as amended by the act of July 14, 1887, and which, as thus amended, is as follows:

"SEC. 34. In any case where the defendant arrested "upon final process shall not be entitled to relief under "the provisions of this act, if the plaintiff will advance "the jail fees and board in manner hereinbefore provided, "the defendant may be imprisoned at $1.50 per day, "until the judgment shall be satisfied, and the officer "making the arrest shall endorse the execution 'satisfied "in full by imprisonment'; *provided*, that no person "heretofore or hereafter imprisoned under the provisions "of this act shall be imprisoned for a longer period than "six months from the date of arrest, and all persons im- "prisoned under the provisions of this act for the period "of six months or more from the time this act takes "effect, shall thereupon be immediately discharged; *pro-* "*vided*, however, that no person shall be released from "imprisonment under this act who neglects or refuses "to schedule in manner and form as provided by this "act."

Your petitioner further says that your petitioner is advised by counsel and verily believes that the questions

presented in said cause and decided by said Circuit Court of Appeals are of sufficient importance to justify their being reviewed and determined by this honorable court for the following reasons:

First. The motion made by your petitioner to dismiss said writ of error for want of jurisdiction involves the question whether any Circuit Court of Appeals has jurisdiction to review any order of a Circuit or District Court other than the final judgment in an action at law or the final decree in a suit in equity.

Second. The conclusion of the circuit judge that your petitioner was entitled to his discharge for the failure of the plaintiffs in said writ of *capias ad satisfaciendum* to pay the board of your petitioner for the second week of your petitioner's imprisonment at the commencement of such week was, as appears from the opinion of said circuit judge, in conformity with the uniform construction placed upon the statutes of Illinois above referred to by the judges of the state courts. The conclusion of the majority of the judges of the said Circuit Court of Appeals, as appears from their opinion, was based solely upon the ground that under the state law, although the plaintiffs in the writ of *capias ad satisfaciendum* neglected or refused to pay the board of a defendant as they were required by law to do, still such defendant was not entitled to his discharge unless he had scheduled in the manner provided by the act referred to, and said judges declined to decide whether said statutes of Illinois were or were not binding upon the courts of the United States sitting in such state, or whether, if they were so binding, your petitioner would have been entitled to his discharge had he scheduled in the manner provided by said act. The learned district judge concured with the learned circuit judges in their conclusion that

the order of the Circuit Court should be reversed, but was of the opinion that the reversal of said order should be based not only upon the ground that your petitioner had not scheduled, but also upon the ground that the requirement imposed by the statutes of Illinois as to the payment by a plaintiff of the defendant's board was solely for the benefit of the sheriff and that, therefore, it did not concern the defendant. And, furthermore, the learned district judge was of the opinion that the laws of Illinois had no application to the case of your petitioner, or to any case of a person imprisoned under process issued out of a court of the United States. By reason of the differences of opinion thus shown to be entertained by said judges such uncertainty as to the law governing cases of this character exists as to render it important to have a final decision of this court.

Your petitioner further says, that your petitioner is advised by counsel and believes that your petitioner is not entitled as of right to prosecute a writ of error for the purpose of obtaining a review by this honorable court of the judgment of said Circuit Court of Appeals reversing said order of said Circuit Court, and that your petitioner can only obtain a review by this court of the judgment of said Circuit Court of Appeals by means of a writ of *certiorari* to be issued by this court requiring said Circuit Court of Appeals to certify said cause to this court for review.

Wherefore your petitioner prays that this honorable court may by *certiorari* or otherwise require said Circuit Court of Appeals of the United States for the Seventh circuit to certify to this honorable court for its review the said case of your petitioner, and as in duty bound your petitioner will ever pray, &c.

RUDOLPH DEIMEL,
by HIRAM T. GILBERT,
his Attorney.

H. T. GILBERT,
of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISION.

Rudolph Deimel, being first duly sworn, on his oath deposes and says, that he is the petitioner in the foregoing petition; that he has read the same and knows the contents thereof and that the matters and things therein set forth are true in substance and in fact.

RUDOLPH DEIMEL.

Subscribed and sworn to before me this 19th day of March, A. D. 1897.

(SEAL.) MATE B. BREWSTER,
Notary Public.

To Messrs. T. A. Moran, Adolf Kraus and Levy Mayer, Attorneys for said Julius Stroheim and Salo J. Stroheim:

You are hereby notified that on Monday, the 5th day of April, 1897, we shall move in the Supreme Court of the United States, at Washington, that a writ of *certiorari* issue as prayed for in the foregoing petition.

Dated, Chicago, Illinois, March 19, A. D. 1897.

HIRAM T. GILBERT,
Attorney for Petitioner.

Received a copy of the foregoing petition and notice this 19th day of March, A. D. 1897.

LEVY MAYER,
Attorney for Julius Stroheim and Salo J. Stroheim.

166-721

Supreme Court, U. S.
APR 2 1897

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 769

JULIUS STROHEIM ET AL.,
Plaintiffs in Error,
vs.
RUDOLPH DEIMEL ET AL.,
Defendants in Error.

Application for *Certiorari* to Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT IN SUPPORT OF APPLICATION.

HIRAM T. GILBERT,
FOR PETITIONER.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

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Plaintiffs in Error,
vs.
RUDOLPH DEIMEL ET AL.,
Defendants in Error.

Application for *Certiorari* to Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT IN SUPPORT OF APPLICATION.

MAY IT PLEASE THE COURT:

This application is made for the purpose of bringing before this court for review a judgment of the Circuit Court of Appeals, for the seventh circuit, reversing an order of the Circuit Court for the Northern Division of the Northern District of Illinois, by which order the petitioner had been discharged from imprisonment under a writ of *capias ad satisfaciendum*, such discharge being based upon the ground that the plaintiffs in the writ had failed to pay the petitioner's board as required by the laws of Illinois.

If the importance of the case, for the purpose of determining whether the judgment of the Circuit Court of

Appeals ought to be reviewed by this court, is to be judged by the amount involved, it may possibly be deemed too insignificant to deserve consideration. By paying about $8,500, if he had that amount of money at his disposal, or by suffering imprisonment for about five months in the county jail, the petitioner might avoid the necessity of an application to this court for relief. But if, on the other hand, the petitioner, notwithstanding the small amount involved, can successfully invoke the jurisdiction of this court, by demonstrating a misconception by the Circuit Court of Appeals of the law as applied to the case, and the necessity of an authoritative and final decision by this court with respect to a question which concerns more or less all federal courts, we have very great confidence that the petitioner can establish his right to be heard. We shall assume, until we learn the contrary, that while this court will exercise sparingly its power to review the judgments of the Circuit Court of Appeals by *certiorari*, it may always be successfully appealed to by any petitioner who can show a clear case of error of the Circuit Court of Appeals resulting in a denial to him of his manifest legal rights.

The record presents a most remarkable condition of things. A circuit judge, a resident of the state, familiar with its laws and the practice of its courts, dealt out to the petitioner precisely the same measure of justice that he would have received, under the same state of facts, from a court of the state. Upon writ of error the Circuit Court of Appeals, composed of two other circuit judges and a district judge, residents of other states, found themselves wholly unable to agree except upon one proposition, and that was that the order of the court below should be reversed.

The two circuit judges, without deciding whether or not the state law was applicable to or binding upon courts of the United States, and without deciding whether the failure of the plaintiffs in execution to comply with the law would in any event have entitled the petitioner to a discharge in a state court, were of the opinion that the petitioner could not be discharged under such state law for non-payment of his board, without having first made a schedule of his property. This was held to be the construction of a state statute, which by its very terms made the payment by the plaintiffs in execution of the petitioner's board a condition precedent to the petitioner's imprisonment, and which also, by its very terms, excepted the petitioner from those who were permitted by law to schedule.

The district judge after announcing his willingness "to "go as far as any one in adopting a strict construction "in favor of personal liberty, *provided always that a "remnant of propriety and good legal sense attend the "decision*," was of the opinion, *first*, that the circuit judges sitting with him were right in holding that the petitioner was not entitled to his discharge because of his failure to schedule; *second*, that the failure of the plaintiffs in execution to pay the petitioner's board was, under the state statute, none of the petitioner's business, but was a matter solely between the plaintiffs and the marshal; and, *third*, that the state law was not applicable to prisoners held in execution under process issuing out of the courts of the United States.

After a full consideration and a decision by the Circuit Court and a review thereof by the Circuit Court of Appeals, how much information has the petitioner acquired as to the rules of law which regulate his imprisonment?

He has discovered that, in any event, *if the law of the state is applicable at all*, he must remain in jail, board or no board, until he has scheduled in accordance with the provisions of a statute, which by its very terms as we shall presently see, denies him the right to schedule. But suppose he should succeed in scheduling, what then would be his rights? For satisfactory answer to this question he will look in vain to the record of the Circuit Court of Appeals, a majority of whose judges express no opinion with respect thereto.

Indeed, there is but one thing which the petitioner has learned and that is that, in matters concerning imprisonment under process in civil cases, the courts of the United States are not bound by state laws nor by the decisions and rulings of state court.

The facts in this case, so far as they need to be stated in order to enable the court to understand the questions of law involved are the following:

On July 23, 1894, plaintiffs in error recovered in the Circuit Court, a judgment against defendants in error for the sum of $8,500 and costs of suit. The cause of action, as set forth in the declaration, was false and fraudulent representations alleged to have been made by defendants in error to plaintiffs in error for the purpose of obtaining credit. Upon this judgment there was issued, on November 17, 1894, a *capias ad satisfaciendum*. Under this *capias* the marshal, on November 20, 1894 (Rec., 39 to 41) arrested the defendant in error, Rudolph Deimel, the petitioner here, and on the same day there was issued out of the court below a writ of *habeas corpus*, directed to the marshal, requiring him to show cause of detention of said defendant in error, which said writ of *habeas corpus* was duly served on the marshal

on November 21, 1894. After certain proceedings in the Circuit Court and in the Circuit Court of Appeals for the Seventh Circuit (*United States* v. *Arnold*, 69 Fed. Rep., 987), said writ of *habeas corpus* was discharged and said defendant in error was remanded to the custody of the marshal on March 14, 1896, and was by him on that day confined and imprisoned in the county jail of Will county, Illinois, under and in pursuance of said writ of *capias ad satisfaciendum*, and continued to be so confined and imprisoned until discharged in pursuance of the order entered by the Circuit Court April 16, 1896, hereinafter mentioned.

Upon the arrest of said defendant in error under said *capias* on November 20, 1894, plaintiffs in error paid the marshal jail fees and board of said defendant in error for one week, and plaintiffs in error also paid the marshal, on March 13, 1896, the further fees and board of said defendant in error for one week, but failed to make or tender to the marshal any further payment on account of the board of said defendant in error until March 26, 1896.

Upon this failure on the part of the plaintiffs in error to make or tender any payment to the marshal on account of said defendant in error's board from March 13, 1896, to March 26, 1896, said defendant in error moved the Circuit Court to discharge him from further imprisonment under said writ of *capias ad satisfaciendum*, claiming that he was entitled to his discharge by virtue of Sections 30 and 31 of Chapter 72 of the Revised Statutes of Illinois of 1874, which provide as follows:

"Sec. 30. In all cases where any person is committed "to the jail of any county upon any writ of *capias ad* "*respondendum or capias ad satisfaciendum* issued in "any suit, it shall be the duty of the creditor in such

" writ to pay the keeper of the jail or sheriff his fees for " receiving such person, and his board for one week at " the time the debtor is committed to jail and be- " fore the jailer shall be bound to receive the debtor, " and in default of such payment, the debtor may be dis- " charged: *Provided*, the officer having such debtor in " charge shall give reasonable notice to the creditor or " his agent or attorney, if within the county, that such " debtor is about to be committed to the jail on such " writ."

" Sec. 31. Should the debtor be detained in jail " under such writ for more than one week, *it shall be* " *the duty of the creditor, at the commencement of each* " *week, to advance to such jailer the board of the* " *debtor for the succeeding week, and in default* " *of such payment in advance, the debtor may be* " *discharged by such jailer.* In case the debtor shall " not be detained in such jail for any week for which his " board may have been paid in advance, the jailer shall " return to the creditor, or his agent or attorney, the " amount so advanced for and unexhausted in board- " ing."

Upon the hearing the Circuit Court, in a written opinion, (Rec., 24 to 38), held that the rights of the plaintiffs in error to keep the defendant in error in imprisonment under the writ of *capias ad satisfaciendum*, was dependent upon a strict compliance by plaintiffs in error with the provisions contained in Sections 30 and 31, above quoted, requiring plaintiffs in error to pay the board of defendant in error at the commencement of each week, and that as plaintiffs in error had failed to pay the second week's board of defendant on March 20, 1896, defendant in error was entitled to his discharge, and entered an order accordingly.

For the purpose of reversing that order plaintiffs in error removed the case by writ of error to the Circuit Court of Appeals for the Seventh Circuit. In that court the defendant in error, Rudolph Deimel, moved for the dismissal of the writ of error for want of jurisdiction and based said motion upon the ground that the order entered by the Circuit Court was not such a final decision as could be reviewed by the Circuit Court of Appeals. This motion was denied by the court and subsequently, the case being submitted upon its merits, the Circuit Court of Appeals reversed the order discharging the defendant in error and directed the Circuit Court to remand him to the custody of the jailer to be held until discharged according to law.

To secure a reversal of this judgment of the Circuit Court of Appeals the present application is made. We shall present our views with respect to the questions presented by this record, by endeavoring to support the following propositions:

First. The Circuit Court of Appeals had no jurisdiction to review the order of the Circuit Court.

Second. The order of the Circuit Court was right and should have been affirmed by the Circuit Court of Appeals.

I.

THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION TO REVIEW THE ORDER OF THE CIRCUIT COURT.

On behalf of the defendants in error, it is respectfully submitted, that the Circuit Court of Appeals had no jurisdiction to review the order thus entered by the Circuit Court, and that the writ of error should, therefore, have been dismissed.

Section 6, of the Act establishing the Circuit Courts of Appeals, provides as follows:

"The Circuit Courts of Appeals, established by this "act, shall exercise appellate jurisdiction to review by "appeal or by writ of error *final decisions* in the District "Court and the existing Circuit Courts in all cases other "than those provided for in the preceding section of this "act, unless otherwise provided by law."

As the case at bar is not one of those provided for in the preceding section, the right of the Circuit Court of Appeals to entertain a writ of error and to review the order of the Circuit Court, depends upon the question whether that order is a *final decision* within the meaning of the Act of Congress. That the terms "final decisions," as used in this statute, has the same meaning as the terms "final judgments and decrees," as used in Sections 699 and 702 of the Revised Statutes regulating the jurisdiction of this court, and which terms have repeatedly been judicially defined by this court, is well settled.

In *Wells* v. *McGregor*, 13 Wallace, 188, the Supreme Court of the Territory of Montana had affirmed an order of the District Court of the Third Judicial District of the

Territory, allowing a motion to set aside a sheriff's return to an execution and awarding an alias execution. To reverse that decision a writ of error was sued out of this court under the ninth section of the Act of Congress organizing the Territory of Montana, approved May 26, 1864, which provided, "That writs of error and appeals "from *final decisions* of the Supreme Court of said ter- "ritory, shall be allowed, and may be taken to the Su- "preme Court of the United States, in the same man- "ner, and under the same regulations, as from the Cir- "cuit Courts of the United States." Upon motion this court dismissed the writ of error, and in doing so said:

"We have often held that such orders as that which "the Supreme Court of the Territory of Montana af- "firmed, are within the discretion of the inferior court. "They are not final judgments, within the meaning of "the Judiciary Act of 1789. Of course they are not "within the meaning of the ninth section of the Organic "Act of the Territory."

In *Harrington* v. *Holler*, 111 U. S., 796, a writ of error was sued out of this court to reverse a decision of the Supreme Court of Washington Territory, dismissing a writ of error to a District Court because of failure to docket the cause in time. Upon motion this court dismissed the writ of error, and in so doing said:

"An order of the Supreme Court of Washington Ter- "ritory dismissing a writ of error to a District Court, be- "cause of the failure of the plaintiff in error to file the "transcript and have the cause docketed within the time "required by law, is not a final judgment or a final de- "cision within the meaning of those terms as used in "sections 702 and 1,911 of the Revised Statutes regula- "ting writs of error and appeals to this court from the

"Supreme Court of the territory. Section 702 provides "for the review of final judgments and decrees by writ "of error or appeal, and section 1,911 regulates the "mode and manner of taking the writ or procuring the "allowance of the appeal. The use of the term 'final "decision' in section 1,911 does not enlarge the scope "of the jurisdiction of this court. It is only a substitute "for the words 'final judgments and decrees' in section "702, and means the same thing."

Under the authorities above cited, therefore, we are authorized to assume it will be held that the term "final decisions" as used in the act defining the jurisdiction of the Circuit Court of Appeals, has the same meaning and construction as the terms "final judgments and decrees" as used in the acts defining the jurisdiction of this court. We shall, therefore, endeavor to show that, under the decisions of this court, the order of the Circuit Court cannot be held to be a final judgment or decision.

In *Boyle* v. *Zacharie*, 6 Peters, 648, a writ of error was sued out of this court to reverse the decision of a Circuit Court in refusing to quash a writ of *venditioni exponas*. The court held that a writ of error would not lie in such a case, and in doing so, among other things, said:

"We consider all motions of this sort to quash execu- "tions as addressed to the sound discretion of the court, "and as a summary relief, which the court is not com- "pellable to allow. The party is deprived of no right "by the refusal; and he is at full liberty to redress his "grievance by writ of error or *audita querela* or other "remedy known to the common law. The refusal to "quash, is not, in the sense of the common law, a "judgment; much less is it a final judgment. It is a

"mere interlocutory order. Even at the common law, "error only lies from a final judgment; and, by the ex- "press provisions of the Judiciary Act of 1789, C. 20, "§ 22, a writ of error lies to this court only in cases of "final judgments."

In *Pickett's Heirs* v. *Legerwood*, 7 Peters, 144, a writ of error was sued out of this court to reverse the judgment of a Circuit Court rendered on a writ of error *coram vobis*, sued out of the same court, for the purpose of correcting an error committed at a previous term. This court sustained a motion to quash the writ of error, and in doing so, among other things, said:

"We think the case comes precisely within the rule "laid down by this court in the case of *Waldon* v. *Craig*, "9 Wheat., 576, with this difference, that the latter was "a case in which the court thought so favorably of the "claim of the plaintiff in error, that they would have "sustained the suit, if it had been possible. The court "there express themselves thus: 'There is peculiar "reason in this case, where the cause has been pro- "tracted, and the plaintiff kept out of possession beyond "the term laid in the declaration, by the excessive de- "lays practiced by the opposite party. But the course of "this court has not been in favor of the idea that a writ "of error will lie to the opinion of a Circuit Court grant- "ing or refusing a motion like this. No judgment in the "cause is brought up by the writ, but merely a decision "on a collateral motion, which may be renewed.

"In that case, as in this, the motion was to extend a "term in ejectment, after judgment; but where the "plaintiff's delay in proceeding with his writ of posses- "sion was not attributable to his own laches. He had "been arrested in his course by successive injunctions

" sued out by the defendants. This court did there re-
" cognize the case of delay by injunction as one in which,
" in that action, the court might exercise the power to
" enlarge the term even after judgment, and the particu-
" lar case as one which merited that exercise of discre-
" tion; but dismissed the writ of error, because it was a
" case proper for the exercise of that discretion, and not
" coming within the description of an error in the prin-
" cipal judgment."

In *Smith* v. *Trabue*, 9 Peters, 4, a writ of error was sued out of this court to reverse the judgment of a Circuit Court awarding a writ of restitution in an action of ejectment. This court dismissed the writ for want of jurisdiction, and in doing so said:

" The Judicial Act authorizes this court to issue writs
" of error to bring up any final judgment or decree in a
" civil action or suit in equity, depending in the Circuit
" Court, etc.

" This is not a final judgment in a civil action or a de-
" cree in a court of equity. It is no more than the
" action of a court on its own process, which is submitted
" to its own discretion. This court takes no jurisdiction
" in such a case. It is not, we think, given by the Judi-
" cial Act.

" The writ of error is quashed and suit dismissed, the
" court having no jurisdiction."

In *Connor* v. *Peugh's Lessee*, 18 Howard, 394, a writ of error was sued out of this court to review the action of a Circuit Court denying a motion made by a tenant in possession to set aside a judgment and execution in an action of ejectment, and to be allowed to defend the suit. This court dismissed the writ of error, and in doing so, among other things, said:

"The tenant in possession having neglected to appear "and have herself made defendant, and confess lease, "entry and ouster, the judgment was properly entered "against the casual ejector. No one but a party to the "suit can bring a writ of error. The tenant having "neglected to have herself made such cannot have a "writ of error to the judgment against the casual "ejector.

"The motion afterwards made to have the judgment "set aside and for leave to intervene, was an applica- "tion to the sound discretion of the court. To the ac- "tion of the court on such a motion no appeal lies, nor "is it the subject of a bill of exceptions or writ of er- "ror."

In *McCargo* v. *Chapman*, 20 Howard, 555, a writ of error was sued out of this court to review the action of a Circuit Court quashing a writ of execution, on the ground that the same had been issued more than seven years after the return of a prior execution. This court dismissed the writ of error and, in doing so, among other things, said:

"Whatever discrepancies may be found in decisions "on this subject, we think a writ of error will not lie on "any judgment, under the act of 1789, which is not "final, in whatever form it shall be given. This may "be illustrated by the case before us. In this case, the "Circuit Court quashed the execution; and by a writ of "error we are called on to revise that decision. What "will be the effect of an affirmance? May not the "Circuit Court issue another execution on the same judg- "ment? In short, is the action of the Circuit Court "final as to anything except the particular motion be- "fore it? May it not be followed by another motion of

"the same import? If the writ of error may be al-
"lowed to one party, it cannot be denied to the other.
"And to what motions shall it be limited?

"It has uniformly been held that error will not lie,
"without a statutory provision, on a motion for a new
"trial, to amend the pleadings, or any other motion
"which depends upon the discretion of the court.

"If, in the language of this court in *Boyle* v. *Zacharie*,
"an execution should be issued, not authorized by the
"judgment, the court, on motion, would set it aside or
"quash it; and should it refuse to do so a mandamus
"would seem to be the proper remedy. It is a writ
"which may be issued to inferior courts and magistrates,
"to require them to execute that justice which the party
"is entitled to, and which, by law, they are enjoined to
"do, and where there is no other remedy."

In *Callan* v. *May*, 2 Black, 541, an appeal was prosecuted to this court to reverse an order obtained by a purchaser of real estate at a sale under a decree in chancery, against one in possession not a party to the suit, to be placed in possession under his purchase. This court dismissed the appeal and, in doing so, said:

"This appeal must be dismissed. The application of
"May for the process to obtain possession of the land
"was not a suit in which any final decree could be passed
"so as to give to either party a right to appeal. The
"proceedings in the Circuit Court after its decree was
"affirmed in the case of *Statham, Smithson & Co.* v.
"*Callan et al.*, were nothing more than proceedings re-
"quired to carry into execution that decree. And when
"May had become the purchaser and the sale was ratified
"by the court, and he had complied with the conditions

" of the sale, he was entitled, as a matter of course, to " the process of the court to put him in possession. The " order of the court directing process to issue is not such " a final order or decree in a case as the act of 1789 " contemplates. It is nothing more than an order of " process to carry into execution a final decree already " passed in a case in which May was not a party."

" If there was any agreement between May and Cal- " lan, after May became the purchaser, whereby the " land was leased to Callan for a term which is not yet " expired, the remedy of Callan was by a bill in equity " setting out the agreement, and praying that May might " be enjoined from disturbing him in his possession. " This would have been a new case in which a final " decree might have been passed and an appeal legally " taken. But such an agreement can furnish no ground " for appeal from an order of the Circuit Court carrying " into execution the mandate of this court in the case of " *Statham, Smithson & Co.* v. *Callan et al.*, in which " May was not a party and had no concern."

In *Barton* v. *Forsythe*, 5 Wallace, 190, a writ of error was sued out of this court to reverse an order of a Circuit Court granting a motion made by the plaintiff to set aside a writ of restitution which had been issued in favor of the defendant, and to grant a writ of restitution to the plaintiff. The record showed that upon a judgment in ejectment rendered in his favor by the Circuit Court, the plaintiff by means of a writ of *habere facias possessionem* had been put in possession of the premises in controversy. Subsequently the defendant moved the court for a writ of restitution, which the court granted. Thereupon the plaintiff in turn moved the court for a writ of restitution to restore him to the possession of the

premises, and the court awarded him a writ of restitution and restored him to possession. It was to reverse the latter order that the writ of error was sued out. This court dismissed it, and in doing so, among other things, said:

"Appellate jurisdiction of this court in writs of error, "under the twenty-second section of the judiciary act, "is confined to final judgments by the express words of "the section, and of course, the writ of error should be "addressed to the final judgment. All the forms of a "writ of error furnished to the clerks of the Circuit "Courts are to that effect, and those clerks have no right "to change the form without the sanction at least of two "justices of this court. Present writ of error is not, on "its face, addressed to the final judgment in the case, "but to an order of the court made on a motion filed by "the plaintiff long after the writ of possession had been "issued and served. Such an order is not a final judg-"ment in any sense within the meaning of the twenty-"second section of the judiciary act.

"First order of the court in awarding the writ of "restitution was irregular, because it was inconsistent "with the mandate of this court, which affirmed the "judgment of the Circuit Court that the plaintiff was "entitled to the possession of the premises. Opposite "party was not notified of the application, which doubt-"less led to the error as the hearing was *ex parte*. "Service of the process gave the plaintiff notice of what "had transpired and he immediately applied to the court "to set the proceedings aside.

"Second application was clearly addressed to the dis-"cretion of the court, as it was in the nature of a peti-"tion to correct an order manifestly irregular, for the

"reason already suggested, and because it had been "passed without notice to the party asking to set it "aside.

"Direct decision of this court in the case of *Smith* v. "*Trabue's heirs*, 9 Pet., 4, was that such an order was "no more than the action of a court on its own process "which is submitted to its own discretion, and that it "was not a final judgment in a civil action nor a decree "in a court of equity.

"Where a case is brought into this court from the Cir- "cuit Court by a writ of error, regular in form, if there "is no error in the record the judgment will be affirmed. "Affirmance in such a case is the proper judgment, be- "cause the writ of error, being addressed to the record, "brings up the whole case, and the court, under the "twenty-second section of the Judiciary Act, has juris- "diction to re-examine the record in such cases and to "reverse or affirm; and if there is no error in the record, "of course the judgment must be affirmed.

"Present case, however, does not fall within that rule, "because the writ of error is special in form and is ad- "dressed to a mere order of the court, passed nearly six "years after the final judgment of the Circuit Court was "affirmed, the writ of possession issued, and the posses- "sion of the premises given to the plaintiff, as com- "manded by the writ."

In *Wells* v. *McGregor*, 13 Wallace, 188, as we have already seen, *supra*, this court held that a writ of error would not lie to reverse a decree of the Supreme Court of Montana affirming an order of an inferior court allowing a motion to set aside a sheriff's return to an execution and awarded an alias execution. And in *Harrington* v.

Holler, 111 U. S. 796, *supra*, this court held that a decision of the Supreme Court of a Territory dismissing a writ of error to a District Court was not a final judgment or decision within the meaning of the Statutes regulating writs of error and appeals.

The cases cited seem so clearly decisive of the one at bar as to render it unnecessary to present any further argument in support of the motion to dismiss the writ of error. The order complained of is not the final judgment rendered in the cause by the court below. The final judgment was rendered on July 23, 1894. The order complained of was rendered nearly two years subsequently, upon a motion addressed to the sound discretion of the court and with respect to which its action cannot be reviewed in the absence of some express provision of law providing therefor. It cannot be pretended that at common law such an order could be reviewed by a writ of error. It cannot be distinguished in principle from an order refusing or sustaining a motion to quash an execution or any of the other orders mentioned in the cases above cited, which it has been held by this court cannot be reviewed by writ of error.

For these reasons the Circuit Court of Appeals ought to have sustained the motion to dismiss the writ of error for want of jurisdiction.

II.

THE ORDER OF THE CIRCUIT COURT WAS RIGHT AND SHOULD HAVE BEEN AFFIRMED BY THE CIRCUIT COURT OF APPEALS.

As will be seen by reference to their opinion, Circuit Judges Woods and Jenkins based their judgment of reversal on the ground that, conceding the laws of Illinois, as expressed in sections 30 and 31 of chapter 72 of the Revised Statutes of Illinois of 1874, hereinbefore quoted, were applicable to process issued out of the courts of the United States, and that the non-payment by the plaintiffs in execution of the board could be availed of by the defendant in error as a ground for his discharge, yet the defendant in error was not entitled to his discharge because he had failed to comply with the requirements of section 34 of chapter 72 of the Revised Statutes of Illinois of 1874 as amended by the act of June 14, 1887, and which, as amended, reads as follows:

SEC. 34. "In any case where the defendant arrested "upon final process shall not be entitled to relief under "the provisions of this act, if the plaintiff will advance "the jail fees and board in manner hereinbefore pro- "vided, the defendant may be imprisoned at $1.50 per "day until the judgment shall be satisfied, and the officer "making the arrest shall endorse the execution 'satisfied "in full by imprisonment;' *provided*, that no person "heretofore or hereafter imprisoned under the provisions "of this act shall be imprisoned for a longer period than "six months from the date of arrest, and all persons "imprisoned under the provisions of this act for the "period of six months or more from the time this act "takes effect, shall thereupon be immediately discharged; "*provided*, however, that no person shall be released "from imprisonment under this act *who neglects or re-* "*fuses to schedule in manner and form as provided by* "*this act.*"

It will be seen that by the very terms of section 34 the payment by the plaintiffs in execution of the defendant's board in the manner provided by sections 30 and 31 of the act is made a condition precedent to his right to imprison the defendant under execution. The language of the section is, that "*if the plaintiff will advance the* "*jail fees and board in manner hereinbefore provided,* "*the defendant may be imprisoned*" etc. Nevertheless, according to the Circuit Court of Appeals, the plaintiff in execution can wholly neglect the requirement that he advance the board of the defendant and still keep the defendant in prison, if the defendant neglects to make a schedule of his property. Were there no other statutory provisions to be considered than sections 30, 31 and 34, above referred to, the construction thus placed upon the law by the Circuit Court of Appeals could not, we respectfully submit, be justly regarded as otherwise than absurd. The proviso that no person shall be released from imprisonment who neglects or refuses to schedule, read in connection with the preceding portions of section 34, must necessarily mean, no person for whom the plaintiff has advanced the jail fees and board in manner hereinbefore provided, but who neglects or refuses to schedule, shall be released.

But when the conclusion of the Circuit Court of Appeals is considered in the light of other sections of the statute, it will appear still less supported by reason.

It would seem too plain for argument that no person could be held to have neglected or refused to schedule in the manner provided by the act referred to, who, by the very terms of that act, was expressly denied the right to schedule.

Section 2 of Chapter 72 of the Revised Statutes of Illinois of 1874, provides as follows:

SEC. 2: "When any person is arrested or imprisoned "upon any process issued for the purpose of holding "such person to bail upon any indebtedness, *or in any "civil action when malice is not the gist of the action*, "or when any debtor is surrendered or committed to "custody by his bail in any such action, or is arrested or "imprisoned upon execution in any such action, such "person may be released from such arrest or imprison- "ment upon complying with the provision of this act."

That an action such as that under which the defendant in error in this case was arrested, is one in which malice is the gist of the action, is settled by the Supreme Court of Illinois.

National Bank v. *Burkett*, 101 Ill., 391.

It follows, therefore, that the defendant in error was not one who could obtain his release from imprisonment by complying with the provisions of the act. The provisions of the act thus referred to are set forth in the subsequent sections, 3 to 11, inclusive, and it is undisputed that they have no application to and cannot, by their terms, be availed of by any defendant in a suit where malice is the gist of the action. They provide for an application to the County Court for discharge and the making by the defendant of a full, fair and complete schedule of all his estate, and they further provide that when such schedule is made and the defendant has assigned his estate to an assignee, he shall upon production to the court of the receipt of the assignee be discharged from his arrest or imprisonment.

It is perfectly plain, therefore, that the defendant in error in this case was not given by the statute the right to schedule, and hence, could not have neglected or re-

fused to do so, unless that right was conferred by the very terms of Section 34. But that section does not purport to confer any such right. It simply requires of the defendant who has the right that he avail himself of it.

That the proviso in Section 34 as amended was not intended to have the meaning given it by the Circuit Court of Appeals is evident from the history of the amendment.

Prior to the act of June 14, 1887, Section 34 of Chapter 72 was as follows:

"In any case where the defendant arrested upon final "process shall not be entitled to relief under the provis- "ions of this act, if the plaintiff will advance the jail "fees and board in manner hereinbefore provided, the "defendant may be imprisoned at $1.50 per day until the "judgment shall be satisfied, and the officer making the "arrest shall endorse the execution 'satisfied in full by "imprisonment.'"

It will thus be seen that prior to the amendment of June 14, 1887, the defendant in a case where malice was the gist of the action could be imprisoned for life if the plaintiff saw fit to advance the jail fees and board in the manner provided by law, and the judgment was large enough so that it could not be satisfied during the defendant's lifetime by the payment of $1.50 per day. Under the law as it then stood, instances occurred in which debtors were kept in prison in the State of Illinois for many years, when the legislatures of other states had many years previously either entirely abolished such imprisonment or reduced it to a very short period. The amendment of 1887 was passed for the sole purpose of placing a limit upon the period of imprisonment in the class of cases referred to. It was certainly not passed to enable the plaintiff in execution to evade his duty of

paying the defendant's board. The provision in reference to scheduling was upon its face aimed not at those defendants who did not pay the judgments rendered against them because they could not, but against those who refused to surrender up their estates for the benefit of their creditors. To give it the effect, therefore, of relieving a plaintiff from compliance with the requirement that he pay the defendant's board is, to say the least, most unreasonable.

That the judges of the Circuit Court of Appeals have misconstrued the Illinois statutes in question seems to us so plain that we do not deem it worth while presenting further argument to demonstrate that their conclusion is erroneous.

Nor do we deem it necessary to consume much time in arguing that the Illinois statutes are binding upon the federal courts.

Section 990 of the Revised Statutes of the United States is as follows:

"990. No person shall be imprisoned for debt in any "state, on process issuing from a court of the United "States, where, by the laws of such state, imprisonment "for debt has been or shall be abolished. And all modi- "fications, conditions and restrictions upon imprisonment "for debt provided by the laws of any state, shall be appli- "cable to the process issuing from the courts of the United "States to be executed therein; and the same course of "proceedings shall be adopted therein as may be adopted "in the courts of such state."

This statute, by its terms, manifestly makes binding upon Federal Courts all state laws relating to imprisonment under process in civil actions. It is true that the Circuit Court of Appeals has construed it as inapplicable

to process issued in actions *ex delicto*, but this construction is obnoxious to just criticism, not only because it is a strict construction against personal liberty, but also because it is a construction of the term "imprisonment for debt" that is entirely inconsistent with its meaning as used in all previous congressional legislation.

The acts of May 5, 1792 (1 Stat. at Large, 26), May 30, 1794 (1 Stat. at Large, 370), May 28, 1796 (1 Stat. at Large, 482), June 6, 1798 (1 Stat. at Large, 562), June 6, 1798 (1 Stat. at Large, 56), January 6, 1800 (2 Stat. at Large, 5), and January 7, 1824 (4 Stat. at Large, 1), all purported by their titles to be "for the relief of persons *imprisoned for debt*," but by their provisions they were made to include all cases of imprisonment under process in civil actions, whether actions *ex contractu* or actions *ex delicto*, thus indicating that Congress had used the term as applicable to all civil cases.

As to whether, assuming the Illinois Statute to be binding, the defendant was entitled to his discharge, it is only necessary to refer to the cases cited in the opinion of Judge Woods, and also the opinion of Judge Showalter, delivered in the Circuit Court. The opinion of the latter shows that, had the case been in a state court, the defendant would have been discharged, and that, consequently, he should be discharged in a Federal Court, unless the latter is not bound by the state laws, or, if it is, is not bound to follow the decision of state courts construing those laws.

We respectfully submit that the writ of *certiorari* should be granted, and that the judgment of the Circuit Court of Appeals should be reversed.

HIRAM T. GILBERT,
For Petitioner.

166-721

Office Supreme Court, U. S.
FILED.
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JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 769

In re petition of Rudolph Deimel for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

ORIGINAL.

ARGUMENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

LEVY MAYER,
Attorney for Julius Stroheim et al., Respondents.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1896.

No......

In re petition of Rudolph Deimel for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit. } *ORIGINAL.*

ARGUMENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The case presented to this court by the petitioner is not one in which review can be had upon *certiorari*. The order which was entered in the Circuit Court for the Northern District of Illinois by Judge SHOWALTER, and which was reversed by the Circuit Court of Appeals for the Seventh Circuit, was upon a motion in the nature of a proceeding upon the writ of *audita querela*.

The petition for the issuance of a writ of *certiorari* shows, at page 5, that the present case was instituted in

the form of a motion made by the petitioner herein for discharge from custody under a writ of *capias ad satisfaciendum*. The petition further shows that that motion was made on April 6, 1896, and that the judgment upon which the *capias ad satisfaciendum* was issued was entered on July 23, 1894. (Rec., p. 8.)

The record shows that a writ of error was prosecuted from the Circuit Court of Appeals to reverse that judgment and that said judgment was affirmed. (Rec., p. 19, *U. S., ex rel. Deimel* v. *Arnold; Deimel* v. *Stroheim*, 16 C. C. A., 575; 69 Fed. Rep., 987.) It further appears from the petition herein that a writ of *habeas corpus* was sued out to test the validity of the detention of the petitioner upon the *capias ad satisfaciendum*, and that the petitioner, after an appeal, was finally remanded to the custody of the marshal on the 7th day of October, 1895. (*Supra*, 34 U. S. App., 302.) The petition does not show, but it appears from the record, (p. 19) that the mandate of the Circuit Court of Appeals was withheld until April 15, 1896, and the reason for this is found in the fact that there was a petition presented to this Court in that case for a writ of *certiorari*, which will be referred to more fully hereinafter.

The motion of the petitioner for discharge from custody is thus seen to have been made long after the judgment upon which the *capias ad satisfaciendum* issued had become final. And the ground upon which discharge was sought upon the motion, was the alleged failure of the judgment creditors who had sued out the writ of *capias ad satisfaciendum*, to comply with certain statutes of Illinois, set out in the petition herein, it being alleged that they did not pay the jail board of the petitioner to the marshal upon the precise day upon which the petitioner

alleged that the second week of his imprisonment in March, 1896, commenced. The question whether there is here involved such a grave or important question of law, that this court should review this case, will be considered in a subsequent part of this brief.

The first point to be suggested is as to the character of this case.

I.

CERTIORARI WILL NOT LIE IN THIS CASE.

This case, it is submitted, must be considered from the same basis as if it were the common law action by *audita querela*. Upon no other ground can the power of the Circuit Court to entertain the motion of the petitioner, or to order his discharge be sustained.

Judge SHOWALTER says in his opinion in this case, (Rec., p. 20):

"In common law, I suppose the appropriate proceeding "here would have been by *audita querela*. But since no "objection* is interposed to the form of the application "* * * and since no occasion for a jury has arisen, "there being really no dispute of fact, an order dis- "charging this petitioner may be properly made on this "application."

There can be no question as to what the motion below was, or as to the effect given it by the circuit judge. He entertained the motion and granted relief upon it under the rule that prevails in some jurisdictions, that such relief as was sought in this case will be granted upon a

* The learned judge overlooked the fact that an explicit objection was duly interposed. (Record, p.. 20)

mere motion or petition, and that the petitioner need not be put to the writ of *audita querela*.

On this point it is said in 3 Encyclopaedia of Practice and Pleading, page 134:

"In England the proceeding by writ of *audita querela* "fell into disuse a century ago, but it has been revived "in later times, and is now used more frequently. In "the majority of the United States it has been super- "seded by the more summary *method* of application for "relief by motion upon notice to the adverse party."

In *Mc Millan* v. *Baker*, 20 Kan., 50–52, the Court says:

"The relief allowed (on motion) assimilates to the "remedy provided by writ of *audita querela*." In the discussion hereinafter of the point made by the petitioner as to the power of the Circuit Court of Appeals to review the order entered by the Circuit Court upon such motion, it will more clearly appear that the motion is in the nature of an action by *audita querela*.

In *Avery* v. *United States*, 12 Wall., 304, this Court says of *audita querela*:

"It is a regular suit in which the parties may plead "and take issue on the merits, and cannot therefore, be "sued against the United States, as in England it could "not against the crown," and *Brooks* v. *Hunt*, 17 Johnson, 484, is cited to that effect.

It is clear that the present proceeding upon such a motion is as independent a suit as was that upon the *habeas corpus* which was directed against this same writ of *capias ad satisfaciendum*.

A proceeding such as the present is not within the several classes of cases reviewable in this Court by means of a writ of *certiorari*, under the Act of March 3, 1891.

Federal appellate jurisdiction, under that Act is divided as follows:

1. Review by this Court of the decisions of the highest courts of the several states. The act expressly declares it does not modify or regulate such right of review, and it is not involved in this case.

2. The direct and exclusive jurisdiction of this Court in the six classes of cases enumerated in Section 5 of the Act. These are cases where the jurisdiction of the Court is in issue, where there is final sentence and decree in prize causes, conviction of a capital or otherwise infamous crime, construction or application of the Constitution of the United States, question of the constitutionality of any law of the United States, or of the validity or construction of any treaty made by it, or of the contravention of the Constitution of the United States by the laws or constitution of a State. These provisions do not affect this case.

3. The general appellate jurisdiction of the United States Circuit Court of Appeals. The sixth section of the act provides:

"That the Circuit Court of Appeals established by this "act shall exercise appellate jurisdiction to review by ap- "peal or by writ of error final decision in the District "Court and the existing Circuit Courts in all cases "other than those provided for in the preceding "section of this act, unless otherwise provided by "law."

This is the section under which, as hereinafter shown, the Circuit Court of Appeals had jurisdiction to review the order herein of the Circuit Court.

4. The final appellate jurisdiction of the United States Circuit Courts of Appeals. This is divided into two divisions.

(a.) A division of five enumerated classes of cases in which the finality of such jurisdiction depends upon the discretion to certify questions of law to this Court by the Courts of Appeals, and the discretion of this Court to review by *certiorari* or otherwise. This division is constituted by the following parts of Section 6, which immediately follow the clause thereof quoted above:

"Sec. 6. * * * The judgments or decrees of the "Circuit Courts of Appeals shall be final in all cases in "which the jurisdiction is dependent entirely upon the "opposite parties to the suit or controversy being aliens "and citizens of the United States or citizens of different "States; also in all cases arising under the patent laws, "and under the criminal laws and in admiralty cases, *ex-* "*cepting* that in every *such* subject within its appellate "jurisdiction, the Circuit Court of Appeals at any time "may certify to the Supreme Court of the United States "any questions or propositions of law concerning which "it desires the instruction of that Court for its proper de- "cision. * * * And excepting also that in any *such* "case as is *hereinbefore* made final in the Circuit Court of "Appeals, it shall be competent for the Supreme Court "to require, by *certiorari* or otherwise, any such case to "be certified to the Supreme Court for its review and de- "termination, with the same power and authority in the "case as if it had been carried by appeal or writ of error "to the Supreme Court."

(b.) A division of cases comprising all cases not within these enumerated classes, where less than $1,000 is involved. In these cases the decision of the Circuit Courts of Appeals is not reviewable. They are comprised within the last clause of Section 6, which is as follows:

"In all cases not hereinbefore, in this section, made "final, there shall be of right an appeal or writ of error "or review of the case by the Supreme Court of the United "States, where the matter in controversy shall exceed "$1,000, besides costs."

5. The absolute jurisdiction of this Court, demandable as of right, to review all cases under this last clause, where over one thousand dollars is involved.

6. The discretionary power of this Court to review the decisions of the Circuit Courts of Appeals in the five classes of cases enumerated in the middle clause of section 6, quoted *supra*.

This power is invoked by petitioner, and the first ground of objection to its exercise in this case is, that the power is limited to the five classes of cases enumerated, and that this case is not within any of said classes.

Jurisdiction upon *audita querela* is not dependent upon jurisdiction in the case wherein the judgment is rendered or the execution is issued. It is an independent action in which the Court has jurisdiction because its judgment or its process is attacked. The jurisdiction is similar to that upon *habeas corpus* where the prisoner is in custody under Federal process.

There is no class of cases reviewable by this Court which can possibly include this case.

Counsel for petitioner, in filing this petition, evidently considers this case as within the power to review by *certiorari*, embraced in section 6 of the act of March 3, 1891.

The construction of counsel for petitioner must be that this power exists in all cases in which the whole section makes the decision of the Circuit Courts of Appeals final.

But after the enumeration of the five classes of cases in which the decision of the Circuit Courts of Appeals are to be final, the section makes an exception *as to such cases only*. It is to be noted that the provision as to review by *certiorari* is in form merely an exception to a provision as to the five enumerated classes of cases.

But even if its form was not controlling, it is clear that to make it apply to all cases of appellate jurisdiction in the Circuit Court of Appeals would utterly ignore the words "such" and "hereinbefore," which clearly apply only to, and restrict the provisions as to certification, to the five enumerated classes of cases. These embrace the most numerous cases arising under Federal jurisprudence and those in which uniformity of decision is necessary to the equal protection of the residents of the various circuits. For they constitute the most numerous class of cases coming into the Federal courts, although of little political importance to the internal or foreign affairs of the government and people at large. When the provision as to review by *certiorari* is examined, it is found that that provision is merely an exception to the enactment regarding said five classes of cases and that by the words "such" and "hereinbefore," it unmistakably restricts its application to such classes of cases: It reads:

"And excepting also that in any *such* case as is *here-*
"*inbefore* made final in the Circuit Courts of Appeals it
"shall be competent for the Supreme Court" to review by certiorari, etc.

Up to this point in the section, the only provision as to finality is that as to the five classes of cases enumerated. The only other provision in the section making the Circuit Courts of Appeals a court of last resort is subsequent; is, in fact, the last clause in the section, being the restriction based upon the pecuniary amount involved, which is quoted above.

The provision of the Act of March 3, 1891, relating to review by certiorari, is clearly a mere exception or proviso to the declaration that in five classes of cases the decisions of the Circuit Courts of Appeals shall be final.

Aside, then, from the fact that in terms it is limited to such cases, its form would so limit it.

"The proper function of a proviso being to limit "the language of the legislature, it will not be deemed "intended from doubtful words to enlarge or extend the "act or the provision on which it is engrafted."

Sutherland on Statutory Construction, Sec. 223.

Black on Interpretation of Statutes (1896), p. 271.

The provision as to review by certiorari is properly a proviso.

"When the terms are used with technical precision, "the distinction between a proviso and an exception is "this: 'An exception exempts absolutely from the op-"'eration of an enactment, while a proviso defeats its "'operation conditionally.'"

Black on Interpretation of Statutes, p. 271.

Being a proviso, the presumption and general rule is, that it was intended to apply only as a modification of the general provisions which precede it, and to be confined to the limits of the preceding clause which it modifies.

"A proviso is always to be construed with reference to "the immediately preceding parts of the clause to which "it is attached."

Endlich, Interpretation of Statutes, Sec. 186, p. 227.

Callaway v. *Harding*, 23 Gratt., 543.

Wayman v. *Southard*, 10 Wheat., 1, p. 30.

DeGraff v. *Went*, 164 Ill., 485–492.

n *Savings Bank* v. *United States*, 19 Wall., 227–235, speaking of a proviso, this Court says:

"It is argued, however, that savings institutions were "relieved by the proviso to the section; that, of course, "is to be construed in connection with the section of "which it is a part, and it is substantially an exception. "It takes out of the operation of the body of the enact- "ment that which otherwise would be within it. It re- "strains the generality of the previous provisions."

Sutherland on Statutory Construction, Sec. 223 says:

"The natural and appropriate office of the proviso "being to restrain or qualify some preceding matter, it "should be confined to what precedes it, unless it clearly "appears to have been intended to apply to some other "matter." * * * "If it be a proviso to a particular "section, it does not apply to others unless plainly in- "tended."

But in construing Section 6 of the Act of March 3, 1891, it is not necessary to rely upon this general rule as to exceptions and provisos. The proviso as to review by *certiorari* in express and apt terms limits its application to the five enumerated classes of cases made final in the principal clause which it modifies. It makes an exception in providing for such review only "in any such case as "is hereinbefore made final."

There is, therefore, no room for contention that the general rule restricting the proviso to the limitation of the clause it modifies should not be applied in this case. By apt words, Congress has clearly shown its intent that this proviso, as to review by *certiorari*, should only apply to such cases as are in the prior parts of the act made final, *i. e.*, the five enumerated classes of cases.

The general purpose of the act further demonstrates the correctness of this construction as properly expressing the intent of Congress.

In *American Construction Co.* v. *Jacksonville Ry.*, 148 U. S., 372, 382, this Court says:

"The primary object of this act, well known as a mat-
"ter of public history, manifest on the face of the act,
"and judicially declared in the leading cases under it,
"was to relieve this Court of the overburden of cases
"and controversies, arising from the rapid growth of the
"country, and the steady increase of litigation; and, for
"the accomplishment of this object, to transfer a larger
"part of its appellate jurisdiction to the Circuit Courts
"of Appeals thereby established in each judicial circuit,
"and to distribute between this Court and those, accord-
"ing to the scheme of the act, the entire appellate juris-
"diction from the Circuit and District Courts of the
"United States."

See, also,

United States v. *Am. Bell Telephone Co.*, 159 U. S., 538–551.

In accord with this general intention to restrict the classes of cases cognizable by this Court, a strict construction should be given to the proviso in question. Inasmuch as Congress has selected the five most important classes of cases enumerated as those over which this Court shall have a final supervisory and discretionary control, there should be, under the general intent and purpose of the act, as well as under the general rules governing the statutory jurisdiction of this Court, a strict limitation of such discretionary review to the classes of cases designated. The saving of the rights to certify and review by *certiorari* in "such" cases is to be construed as a negation of such rights in all other cases.

Endlich, Interpretation of Statutes, Sec. 397.

Ex parte McCardle, 7 Wall., 506.

In a case involving a similar proviso an Illinois Court says, in *Epps* v. *Epps*, 17 Ill. App., 196:

"It would seem that the same policy which dictates "a liberal construction of the statute in furtherance of "its general beneficial purpose would necessitate a re- "stricted construction of an exception by which its oper- "ation is limited and abridged."

This is the general rule where a proviso introduces an exception to the general object sought to be attained by an act. In this act the general object is to relieve this Court of the weight of matters not involving such important questions, or such amounts as Congress considered requisite to any demand upon the Court's consideration. To construe this proviso as allowing the Circuit Courts of Appeals to certify questions in all cases where less than one thousand dollars is involved, or as allowing a demand upon the discretionary power of this Court to review by *certiorari*—*and the allowance of one involves the allowance of the other*—would be to defeat the intention of Congress to relieve this Court and would throw upon it *a larger class of cases, and a mass of controversies of less importance in amount involved and otherwise, than have ever before been reviewable by this Court.*

The general rule which is applicable, and which demands a strict construction of the proviso in question, is stated by Justice STORY in *United States* v. *Dickson*, 15 Peters, 141, p. 165, as follows:

"We are led to the general rule of law which has al- "ways prevailed, and become consecrated almost as a "maxim in the interpretation of statutes, that where the "enacting clause is general in its language and objects, "and a proviso is afterwards introduced, *that proviso is "construed strictly*, and takes no case out of the enacting "clause which does not fall fairly within its terms. In "short, a proviso carves special exceptions only out of "the enacting clause; and those who set up any such ex- "ception, must establish it as being within the words as "well as within the reason thereof."

There should not, therefore, be any attempt in construing this act, to avoid the obvious limitation intended by the words "such" and "hereinbefore" in the sixth section.

In addition to these general considerations arising from the rules of construction applicable to the clause in question are the decisions of this Court upon this act.

In *United States* v. *Amer. Bell Tel. Co.*, 159 U. S., 548, p. 551, this Court clearly recognizes what is manifest from the reading of the statute itself, that there is a class of cases in which the decision of the United States Circuit Courts of Appeals is final, and as to which no provision of law is made for a review either by a certificate from that Court or by writ of *certiorari* from this Court.

Any cases decided, appearing to ignore this construction of the act, will be found upon careful inspection to have involved questions of the validity and construction of treaties of the United States with foreign powers, and to have presented for consideration upon that basis, most important questions of international rights and international law.

In other words, cases in which there was no right of review in the Circuit Court of Appeals, but where the case should in the first instance have been appealed to this court, and it will be found that in fact a revenue or criminal law, or a law as to maritime jurisdiction (an admiralty case), was involved.

II.

THE QUESTIONS INVOLVED ARE NOT OF SUCH GRAVE AND GENERAL IMPORTANCE THAT THE CONSIDERATION OF THEM BY THIS COURT IS PROPERLY DEMANDED.

The controlling questions of law to which the attention of this Court is directed by the petitioner were with the exception of the question as to the jurisdiction of the Circuit Court of Appeals, determined in an appeal to the Circuit Court of Appeals for the Seventh circuit in this same litigation, and counsel sought to bring the decision of that Court before this Court by a petition for *certiorari*, which was denied. (*In re petition, Rudolph Deimel, Original, Number 913, October Term, A. D. 1895*, 163 U. S., 709.)

The decision sought to be reviewed upon the former petition for *certiorari* was one upon an appeal from an order denying a petition for *habeas corpus*, by which the petitioner sought to escape imprisonment upon the same writ of *capias ad satisfaciendum* which is here involved. In the Circuit Court of Appeals that appeal was heard and determined, together with an appeal questioning the judgment and the issuance thereon of the writ of *capias ad satisfaciendum*, adversely to the petitioner.

United States ex rel. Deimel v. *Arnold*, and *Deimel et al.* v. *Stroheim et al.*, 34 U. S. App., 302; 16 C. C. A., 575; 69 Fed. Rep., 987.

The appeal now sought to be reviewed is from an order reversing the order of Judge Showalter which discharged the petitioner from custody upon this same *capias ad satisfaciendum*, upon the ground that he was

entitled to such discharge because of non-compliance with the laws of the State of Illinois governing such writs.

It was expressly held in the former opinion of the United States Circuit Court of Appeals (34 U. S. App., 302), which was unsuccessfully sought to be reviewed in this Court, that these laws of the State of Illinois did not apply to the writ of *capias ad satisfaciendum* involved in this case.

The effect of such decision and its correctness were debated at great length by the same counsel who represents the petitioner upon the present petition, on the brief filed in support of his former petition. In fact, it was the only question presented in that brief. (Pages 5, 15, and appendix to brief in support of application for a writ of *certiorari* in No. 913 of this Court, October term, A. D. 1895.)

These facts are presented and the attention of the Court invited to the petition and briefs filed upon the former application for *certiorari*, because it is deemed probable that the Court was satisfied with the correctness of the views of the Circuit Court of Appeals for the seventh circuit, or classed the question here presented among those of such limited or local importance that their consideration upon *certiorari* was not advisable. If the Court finds that the petition herein calls for further examination, then the following suggestions as to the importance and merits of the questions raised by counsel for the petitioner are deemed conclusive.

III.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO REVIEW THE ORDER OF THE CIRCUIT COURT DISCHARGING THE PETITIONER.

In *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U.S., 372,368, a petition for *certiorari* was presented asking review of an appeal which it was averred had been improperly entertained by the Circuit Court of Appeals as an appeal from an interlocutory order. It was averred that the order setting aside and vacating the the appointment of a receiver, which was reviewed on appeal, was not an appealable order; and this Court disposed of the point by saying: "That affords no ground "for the extraordinary interposition of this Court by "*certiorari* or mandamus."

But, in any event, in this case the point as to the jurisdiction of the Circuit Court of Appeals is so utterly without foundation that it does not demand serious consideration.

As already indicated, the proceeding in this case in the Circuit Court was by a motion, in the nature of an action by *audita querela*.

It would be absurd to insist that a mere modification of what is a matter of *method* only, could affect substantial rights.

Where the motion is substituted for the writ, the order on the motion must be given the same force and effect as would be given a judgment in *audita querela*.

At pages 10 and 11 of the brief submitted to the Circuit Court of Appeals by the respondents herein, which is

appended hereto, it is shown that this was not a proper case for the substitution of the more summary method of proceeding by motion.

If in this case it was not proper to proceed by a mere motion to grant relief obtainable only by *audita querela*, there is no ground of complaint against the reversal by the Circuit Court of Appeals of the order of the Circuit Court.

But inasmuch as the method of proceeding upon a mere motion *was* followed in this case, certainly the same force and effect will be given to the order on the motion as would be given to a judgment upon *audita querela*.

The judgment upon *audita querela* was reviewable at common law.

3 Ency. Plead. & Prac., page 124, says:

"The decision upon *audita querela*, if in complainant's "favor, puts an end to the judgment, so that no further "proceedings can be taken upon it. * * * It is the "proper subject of an appeal or writ of error."

In *Newhart* v. *Wolfe*, 102 Pa. St., 561, and in numerous other cases where judgments upon *audita querela* have been reviewed, the fact that such judgments are reviewable in the same manner as any other final order or judgment is very evident.

See

Gleason v. *Peck*, 12 Vt., 56; 36 Am. Dec., 329.

In this Court a writ of error was entertained in *Avery* v. *United States*, 12 Wall., 304, in a case where the defendant had first sought relief by motion, and then by *audita querela*, and the lower court had denied the motion and refused to issue the writ. It is to be noted that the

question whether this action of the court below was a final judgment was called to the attention of this Court, and it *affirmed* the decision of the lower court, thereby necessarily holding that the order appealed from was final.

The authorities cited by counsel for petitioner are not in point because in none of them was there a final disposition of the subject-matter involved in the motion.

Thus, in *Boyle* v. *Zacharie*, 6 Peters, 548, this Court says (p. 656 of opinion):

"The question here is not whether a writ of error "lies to an erroneous award of execution, for there was "no error in the award of the *fieri facias*. But the "question is, whether a writ of error lies on the REFUSAL "to quash the auxiliary process of *venditioni exponas*, "UPON MERE MOTION. In modern times courts of law "will often interfere *by summary proceedings or motion*, "and quash an execution erroneously awarded, where a "writ of error, or other remedy, such as a writ of *audita* "*querela* would clearly lie. *But because the court* MAY, "IT DOES NOT FOLLOW THAT IT IS BOUND THUS TO ACT IN "A SUMMARY MANNER. * * * The relief is allowed "or refused, according to circumstances; and it is by no "means uncommon for the court to refuse to interfere "upon motion, in cases where the proceedings are clearly "erroneous, and to put the party to his writ of error or "other remedy, *for the* REFUSAL *of the motion leaves* "*every* remedy, which is of right open to him."

So in every case, the denial of the motion leaves recourse to *audita querela* still open.

"The writ may issue after a refusal of summary relief "on motion."

3 Ency. Plead. & Practice, Title *audita querela*, p. 125.

Emery v. *Patton*, 9 Phila. (Pa.), 125.

And therefore an order *denying* such motion is clearly interlocutory.

In *Boyle* v. *Zacharie*, *supra*, the Supreme Court cites and relies on *Brooks* v. *Hunt*, 17 John. R., 484.

In *Brooks* v. *Hunt*, the defendant made such a motion. It was denied, but *leave was given him to sue out a writ of audita querela*, AND HE DID SO. (17 John. R., p. 484.)

See, also,

Brooks v. *Hunt*, 18 John. R., 4.

But he attempted to prosecute a writ of error to the *denial of the motion*. The application to the court to entertain such *motion* was, as has been seen, addressed to its judicial discretion. The court decided within its discretion, to put the defendant to his writ of *audita querela*, AN ALTERNATIVE WHICH HE HAD ASKED HIMSELF. In such case it was clear beyond doubt that there was no final order disposing of any question but one of procedure.

In that very case the court by *Chancellor* KENT shows that the judgment on *audita querela* is reviewable, for he says of the writ of *audita querela*:

"That writ has been granted to him, and it is a regu-
"lar suit, in which the plaintiff in error can set up his
"discharge, under the insolvent act of 1811, in bar of the
"execution. The parties can plead and take issue either
"in law or fact, upon the merits and legality of the dis-
"charge; and a regular judgment must be pronounced in
"the Supreme Court, *upon which error can be brought*
"*into this court;* AND FROM HERE INTO THE SUPREME
"COURT OF THE UNITED STATES, if the case should re-
"quire it. * * * It is not an uncommon thing for
"a court of law, if the case be difficult or dubious, to re-
"fuse to relieve a party after judgment and execution in
"a summary way by motion, and to put him to his
"*audita querela.*" (Citing cases.)

Boyle v. *Zacharie*, and *Brooks* v. *Hunt*, merely held that the *refusal* of the motion is interlocutory, because it does not dispose of the matter finally, there being recourse to a renewed motion or *audita querela*.

All of the other cases cited by counsel for defendants in error are distinguishable on this same test of finality as to the matter involved.

It has been expressly held that the order *granting* the motion and *discharging* the prisoner, is a *final order*. In *Lench* v. *Purgiter*, 1 Doug., 68, Lord MANSFIELD was asked to set aside an order of discharge where the prisoner on a *capias ad satisfaciendum* had been discharged by one of his associate judges in the same court. The discharge was granted under the Lord's Act, because the jail fees and board had been paid one day too late. Lord MANSFIELD was of the opinion that this was no ground of discharge, as the prisoner had accepted the tardy payment, but he held that the order was *final*, and that therefore, he, in the same court, could not interfere.

In some jurisdictions the procedure by motion which was followed in this case, instead of that upon the writ of *audita querela*, has been held to be proper and within the discretion of the trial court. But in such states the order granting such motion has been uniformly held to be a final judgment, reviewable upon appeal or error. Indeed, the rule seems to be so well settled that but one or two cases can be found where there is even a suggestion that the finality of the order could be considered as a debatable question.

Smock v. *Dade*, 5 Rand. (Va.) 639, 644 (Appeal).

McMillan v. *Baker*, 20 Kan., 50 (Writ of Error).

Benwood Iron Works Co. v. *Tappan*, 56 Miss., 659 (Writ of Error).

Steele v. *Boyd*, 6 Leigh (Va.), 547 (Writ of Error).

Dunlap v. *Clements*, 18 Ala., 778 (Writ of Error.)

Harper v. *Kean*, 11 S. & R. (Pa.), 280, 298 (Writ of Error).

Chambers v. *Neal*, 13 B. Mon., 256 (Appeal.)

Marsh v. *Hayward*, 6 Humph. (Tenn.) 210.

Macdonald v. *Falvey*, 18 Wis., 571 (Appeal.)

That the order against which the writ of error herein is directed is a "final decision" of the Circuit Court seems beyond any question. The Circuit Court cannot vacate it, because, as said by Lord MANSFIELD *supra*, it was a final order, and the term has passed. Mandamus would afford no relief.

Baker v. *Judges of Ulster*, 4 Johns. R., 191.

Ex parte Flippin, 94 U. S., 348.

There is no relief but by writ of error, and upon principal and precedent this remedy exists against a judgment upon *audita querela*, and against an order upon a motion by which the same kind of relief is sought as is ordinarily obtained in *audita querela*. For, as said in *McMillan* v. *Baker*, 20 Kan., 50-52:

"The relief allowed (on motion) assimilates to the "remedy provided by writ of *audita querela*."

It must therefore be similarly subject to review.

The petitioner moved in the Circuit Court of Appeals to dismiss the writ of error on the ground that the order of Judge Showalter was not reviewable. Upon this point the Circuit Court of Appeals said:

"If the proceedings in the Circuit Court had been by "*audita querela*, in accordance, it would seem, with the "better practice, the right to a writ of error would have "been without question. As made upon motion, the or- "der of discharge was no less final in its character and "effect. If the motion to discharge had been denied, it "might be said, as in *Boyle* v. *Zacharie*, *supra*, that the "court was not bound to act summarily, and that, as the "refusal of such a motion leaves other remedies open, "the order is not final, and therefore not appealable. "But by whatever method obtained, an order of dis- "charge in such a case is, in its nature, final. Its re- "vocation or correction cannot be compelled by *manda-* "*mus*, and the only means of relief is by writ of error." (Rec., p. 60.)

IV.

THE QUESTIONS UPON WHICH THE DECISION OF THE CIRCUIT COURT OF APPEALS RESTS, ARE OF LOCAL IMPORTANCE ONLY, AND WERE CORRECTLY DETERMINED BY THAT COURT.

From the brief which was filed by these respondents in the Circuit Court of Appeals, and which is herewith submitted to this Court, and from both opinions handed down in the Circuit Court of Appeals, it is manifest that there was an effort made there to procure from that Court a similar holding in this case to that made in *United States* v. *Arnold*, 34 U. S. App., 302; 69 Fed. Rep., 987, where it was held that the Statutes of Illinois did not apply to the writ of *capias ad satisfaciendum* here involved.

The majority opinion of the Court of Appeals in this case declares that:

"This view is borne out by the decision in *McNutt* v. "*Bland* (2 How., 1), unless by later legislation of Con- "gress a different rule has been introduced. In Missis- "sippi, as in Illinois, there was a special provision for "prisoners committed under Federal process, and a dis- "tinct and more general provision for the regulation of "imprisonment on civil process. In the case referred to, "the latter provision was held to be only a municipal "regulation for the guidance of state officials, and *we are* "*unable to see that sections 30 and 31 of the Illinois* "*statute, besides being a local municipal regulation, can* "*constitute a restriction upon imprisonment for debt upon* "*Federal process, unless given that effect by force of sec-* "*tion 990 of the Revised Statutes, the substance of which* "*seems to have been first enacted in the act of February* "*28, 1839, 5 Stat., 321.* * * *

"The proposition in the opinion below that section 990 "is applicable to judgments for tort, it is contended, is "inconsistent with the opinion of this court in *United* "*States* v. *Arnold, supra*, where it was said that 'im- "'prisonment for debt, as used in this and like statutory "'provisions, means debts arising out of contracts, and "'does not extend to actions for torts nor to fines or "'penalties arising from a violation of the laws of the "'state.'" (Rec., p. 61.)

The majority opinion, however, then proceeds to hold that that point is not necessarily involved in the case, but significantly cites *In re Sanford Fork and Tool Co.*, 160 U. S., 247, wherein this Court says:

"It must be remembered, however, that no question "once considered and decided by this court can be re- "examined at any subsequent stage of the case."

(See, also, pages 12 and 13 of brief hereto attached, filed by respondents in the Circuit Court of Appeals.)

While the assenting minority opinion of the Circuit Court of Appeals squarely considers the general question of the application of the State laws to Federal process, that point is left by the majority opinion as it was established in *United States* v. *Arnold*, *supra*, which, as has been seen, this Court refused to review upon *certiorari*.

Before turning to the point upon which the Circuit Court of Appeals decided this case, it remains to be remarked that the *fact* upon which the whole contention of the petitioner is based, namely, that *his board was paid six days too soon*, is one of which he has no standing to complain.

(See pages 46 to 54 of Circuit Court of Appeals brief, hereto attached.)

The statute of Illinois in question merely reads:

"* * * In default of such payment in advance, the "debtor *may* be discharged by such jailer." (Appendix to Circuit Court of Appeals brief, p. 16.)

It is clear that, inasmuch as the jailer is bound, under sections 16 and 19 of Chap. 75, Rev. Stat. Ill. (appendix to Circuit Court of Appeals Brief, pp. 18, 19) to furnish each prisoner with food and clothing, the provision in the section in question as to prisoners on civil process is merely intended for the protection of the jailer.

In California there are in force the following provisions:

§ 1143. Civil Code Procedure, Cal.: "Any person "confined in jail, on an execution issued on a judgment "rendered in a civil action, *must* be discharged therefrom "upon the conditions in this chapter specified."

§ § 1144 to 1153 : Provisions for discharge on examination before a judge, or on order of plaintiff.

§ 1154. "*Whenever a person is committed to jail on an execution issued on a judgment recovered on a civil action, the creditor, his agent or attorney,* MUST *advance to the jailor on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment; and in a case of failure to do so, the jailer* MUST *forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor.*"

In *ex parte Lamson* 50 Cal., 306, a case (on all fours with the one at bar), arose upon the construction of these provisions. The full report of the case is as follows:

"On the 14th day of March, 1871, a judgment was rendered in the District Court of the Fifteenth Judicial District, in favor of A. M. Burns, against the petitioner, in a civil action, for the sum of $15,404.94, and convicting him of fraud. On the 3rd day of August, 1875, the petitioner was arrested on an execution issued on the judgment and imprisoned in the jail in San Francisco. About one week after the petitioner had been imprisoned, the attorney for the plaintiff called on the deputy sheriff and tendered him twenty dollars to pay the expense of keeping the prisoner, but he said he was busy and could not receive the money then, and Pierson replied that he could have the money at any time.

"On the 16th of September following, Pierson paid the sheriff for the support of the petitioner, from the time of his arrest to the 24th of September. On the 23d of of September, the petitioner applied to the Supreme Court for his discharge on *habeas corpus.*

"By the Court.

"The 1154th section of the Code of Civil Procedure requires the plaintiff in execution, who has caused the defendant to be arrested in a civil action, to advance to the jailer moneys sufficient for the support of the de-

"fendant while in jail, for one week, and also to make a "similar advance weekly for the same purpose during the "imprisonment, and provides that in case of the failure "of the plaintiff to do so, the defendant *must* be dis- "charged from custody by the jailer. The failure upon "the part of the plaintiff to comply with these require- "ments of the statute does not, *per se*, operate as a dis- "charge of the defendant. His interest, so far as he "can be said to have one, is merely that he be furnished "with proper support while detained in custody. If he "be adequately maintained and supplied, it is no concern "of his as to the state of the accounts between the jailer "and the plaintiff in execution. If the plaintiff satisfy "the claim of the jailer, or the latter be willing to trust "to the former for reimbursement for supplies furnished "the defendant, the purpose of the statute is satisfied. "It results from these views that the prisoner must be "remanded, and it is so ordered."

The reasoning of the Supreme Court of California applies with even more force to the statute of Illinois, than to the statute of California, because in Illinois the intention to protect the jailer (and not the defendant) and to go no further, is manifested in the provision that discharge for non-payment of board shall not affect the judgment. (Circuit Court of Appeals brief, appendix, page 17.)

In *Lambert* v. *Wiltshire*, 144 Ill., 517, where there was a dischage *by the jailer* for non-payment of the board, it was held that the judgment remained unaffected. The Illinois statute does not provide for discharge by an order of Court, as it should and would have done, if the provision as to payment of board was one intended for the benefit of the defendant.

It is thus clearly different in this respect from the Lord's Act, and from the acts of Mississippi and of Massachusetts, and all others where discharge from imprisonment is a matter of right in the prisoner. The provision

as to advancing board is clearly made merely for the purpose of securing to the jailer prepayment for the subsistence which the statute *requires* him to furnish to prisoners.

It is therefore submitted, that, if this Court comes to a construction of the statutes of Illinois involved in this case, it will find that there was no valid ground thereunder for the order of discharge entered by the Circuit Court.

Upon the construction of those sections of the statutes of Illinois under consideration, by which a schedule of assets and liabilities, and assignment for the benefit of creditors is required of any prisoner seeking the benefit of those acts, the Court's consideration is respectfully asked of pages 54 to 64 of the brief of these respondents filed in the Circuit Court of Appeals. The substance of the contention there advanced is contained in the majority opinion of the Circuit Court of Appeals, but the brief may afford aid to this Court in the citation of authorities and quotation of the statutes involved, which are therein contained.

It is respectfully submitted that the petition and record do not present a case of such importance, or any questions, the correctness of whose determination by the Circuit Court of Appeals is open to sufficient doubt, to call for review of the case by this Court.

Respectfully submitted.

LEVY MAYER,

Attorney for Stroheim et al., Respondents.

IN THE

United States Circuit Court of Appeals,

FOR THE SEVENTH CIRCUIT.

October Term, A. D. 1895.

No. 328.

SALO J. STROHEIM et al.,
Plaintiffs in Error,
vs.
RUDOLPH DEIMEL et al.,
Defendants in Error.

Writ of Error to the Circuit Court, Northern Division, Northern District of Illinois.

Hon. JOHN W. SHOWALTER, Judge Presiding.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

The writ of error in this case is directed against an order entered by the Circuit Court in the case of *Stroheim et al.* v. *Deimel et al.*, discharging Rudolph Deimel from imprisonment upon a writ of *capias ad satisfaciendum*, issued upon the judgment in that cause. That judgment was entered on July 23, 1894, and on November 17, 1894, the *capias* here in question, was sued out thereon. Upon that writ Rudolph Deimel was arrested November 20, 1894. On the same day he sued out a writ of *habeas corpus*, and on *the next day* the same was served upon the

marshal. The Circuit Court (Judge Allen) remanded the prisoner to the custody of the marshal upon his return to the writ of *habeas corpus*, but the prisoner appealed from that order to this Court, and was released upon recognizance pending the appeal. This Court sustained the Circuit Court. (Term No. 221, October term, 1894, 69 Fed., 987.) Thereupon Deimel presented to the Supreme Court his petition for review by *certiorari*, and obtained a withholding of the mandate of this Court pending such petition.

The petition was submitted to the Supreme Court upon full printed arguments and denied. The mandate of this Court was then issued and filed below on March 14, 1896. On that day the marshal again took Rudolph Deimel into custody under the remanding order and writ of *capias ad satisfaciendum*. On Deimel's own motion the Court directed that he be taken to and confined in Will County jail. (Rec., 15.)

The enlargement of the prisoner pending the *habeas corpus* proceedings was of course upon that writ; for while a prisoner held under and pending a hearing upon a writ of *habeas corpus* may be enlarged on a recognizance, such enlargement is unknown where the detention is under a writ of *capias ad satisfaciendum*.

Matson v. *Swanson*, 131 Ill., 255.

There is in force in the State of Illinois a statute concerning insolvent debtors, in which, by the revision of 1874, there was incorporated the following provisions from an act of 1853 (Laws Ill., 1853, p. 258):

Section 30, *Chap.* 72; *Rev. Stat. Ill.* "*Jail Fees.*— "In all cases where any person is committed to the jail "of any county upon any writ (of) *capias ad respondendum* or *capias ad satisfaciendum* issued in any suit, it

"shall be the duty of the creditor in such writ to pay the "keeper of the jail or sheriff his fees for receiving such "person, and his board for one week, at the time the "debtor is committed to jail, and before the jailer shall "be bound to receive the debtor, and in default of such "payment the debtor *may be* discharged. Provided the "officer having such debtor in charge, shall give reasonable "notice to the creditor or his agent or attorney, if within "the county, that such debtor is about to be committed "to jail on such writ.

"*Sec.* 31. *Ibid. Further Jail Fees. Unexpended "Fees.*—Should the debtor be detained in jail *under such "writ* for more than one week, it shall be the duty of the "creditor, at the commencement of each week, to ad- "vance to such jailer the board of the debtor for the suc- "ceeding week, and in default of such payment in ad- "vance the debtor may be discharged by such jailer. In "case the debtor shall not be detained in such jail for any "week for which his board may have been paid in ad- "vance, the jailer shall return to the creditor, or his "agent or attorney, the amount so advanced for and un- "exhausted in boarding."

Under the claim made by Rudolph Deimel that the terms of this statute had not been complied with, the Circuit Court (Judge Showalter) discharged him from imprisonment on April 16, 1896.

The facts upon which this order was entered are as follows:

When Deimel was first arrested upon the *capias ad satisfaciendum* in November, 1894, as above stated, counsel for plaintiffs in error, in order to avoid any embarrassment or complications with the marshal or the jailer, paid the marshal the sum charged for board in the case of state prisoners and the jail fees payable in such cases at the county jail of Cook County. (Rec., 47.)

The imprisonment on the *capias* was suspended *on the next day* after Deimel's arrest by the service of a writ of

habeas corpus on the marshal, as above stated. In the eye of the law the plaintiffs in error had no concern with the showing made by the marshal in return to that writ. As to them it simply suspended but did not terminate the imprisonment under their *capias*. Accordingly, when Deimel was remanded into custody under the *capias* on March 14, 1896, there was in the hands of the marshal the board and jail fees for the first week, and of that week *only the first day had been passed in jail under the capias*. As there was at the time of the remanding of Deimel on March 14, some doubt as to the exact status of affairs, due to the lapse of time since the arrest in November, 1894, plaintiffs in error advanced a second week's board and jail fees at that date. (Affidavit Holden, Rec., 43; affidavit Marshal, Rec., 46.) This, it will be observed was sufficient to pay Deimel's board until March 27, for the first week of his imprisonment would end March 19, and the second March 26. Pending the ascertainment of the status of affairs nothing further was done until March 23. On that day plaintiffs in error were informed by the deputies in the marshal's office that Deimel claimed that his first week's imprisonment ended March 21, and that, no board having been paid on that day, he demanded his release. This was refused by the marshal's office, and for the sake of further security plaintiffs in error paid the marshal on March 26, *seven* dollars, or two weeks board and jail fees. Subsequently, on the 28th day of March, and on the 2d and 4th days of April plaintiffs in error advanced a week's board and jail fees to the marshal. (Rec., 44, 45.)

Deimel delayed until April before making his motion for discharge, and during more than four weeks subsequent to the 21st day of March *remained in jail and ac-*

cepted and lived upon the board furnished with the money paid by the plaintiffs in error.

On April 16, 1896, upon an oral motion only, the Court entered the order here complained of. It was objected that the Court had no jurisdiction; and the fact that relief could be had only upon *audita querela* was insisted upon. These objections to the jurisdiction are preserved by the bill of exceptions. (Rec., 42.) This fact is of importance because the opinion of the Court (Rec., 29) would seem to indicate that while the Court remembered and agreed with the contention as to *audita querela*, the fact of the objection to the jurisdiction was overlooked and disregarded.

As the Court entertained the motion over this objection the facts were presented by affidavits. Both motion and objection were orally made, and no written pleading, petition, motion, or objection was presented to the Court.

The substance of the reasons, jurisdictional and otherwise, urged in this argument were presented to the Circuit Court, but that Court nevertheless entered the order of discharge. To protect the marshal from an action for an escape, in case it should appear that there was want of jurisdiction or error, a recognizance was required, by the order, and entered into by Deimel and sureties, for the surrender of the prisoner in case the order of discharge was reversed. (Rec., 31 to 33.) The assignments of error (Rec., 35) question the action of the Circuit Court on the question of jurisdiction, as being erroneous under the law and the facts involved.

BRIEF.

I.

THE CIRCUIT COURT WAS WITHOUT JURISDICTION TO ENTER THE ORDER COMPLAINED OF.

a. The relief should have been sought upon *audita querela.*

Commonwealth v. *Whitney*, 10 Pick 434–438.

Brackett v. *Winslow*, 17 Mass., 153.

Brooks v. *Hunt*, 17 Johns., 484, 486.

b. The jurisdiction over applications for discharge is limited to the State County Court, and the *manner of discharge* regulated by the statute under which Deimel was released. That statute was not followed.

Sect. 1, Act 1872, Chapter 72, Rev. Stat. Ill. (Appendix, p. 14).

Sects. 990, 991, Rev. Stat. U. S.

II.

THE ILLINOIS STATUTE DOES NOT APPLY TO FEDERAL PROCESS.

Sections 990, 914, 991 and 916 of the Revised Statutes of the United States are the only acts of Congress touching the subject, and unless *they* adopt the Illinois statute it does not apply.

Deimel v. *Stroheim*, 69 Fed. Rep., 987, and cases cited.

The *law of this case*, as laid down in *Deimel* v. *Stroheim*, *supra*, must govern on this writ of error.

Wells, *Res Adjudicata*, § 613.
23 Am. and Eng. Ency. Law, p. 31, and cases cited therein.

A.

Section 990 does not apply.

The decision of this Court on the former writ of error covered, and necessarily involved the same question of statutory construction here involved. That decision, being the law of this case, settled the construction of section 990.

Authorities, *supra* and
Atty. Gen. v. *Lum.*, 2 Wis., 514.

Section 990 applies only to "imprisonment for debt," which does not include imprisonment on a judgment *ex delicto*.

Deimel v. *Stroheim*, 69 Fed. Rep., 987.
Moore v. *Greenn*, 73 N. C., 394.
Rich v. *People*, 66 Ill., 513.
McKindley v. *Rising*, 28 Ill., 337 (1862).
People v. *Cotton*, 14 Ill., 414 (1853).
People v. *Greer*, 43 Ill., 213 (1867).
McCool v. *State*, 23 Ind., 127 (1864).
U. S. *Walsh*, 1 Abb. C. C., 66 (1867).
Hanson v. *Fowle*, 1 Sawy, 497(1871).

The meaning of the words "imprisonment for debt" having had thus uniform construction prior to December

1873, Congress is presumed to have used them in the Revised Statutes as thus construed.

Endlich Construction Statutes § 367, 368, 369.
Reiche v. *Smythe*, 13 Wall., 163.
Vane v. *Newcombe*, 132 U. S. 220, 235.

Further as to construction of words, imprisonment for debt,

See

Ex parte Bergman, 18 Nev., 331, 342.
Harris v. *Bridgers*, 57 Ga., 407.
Long v. *McLean*, 88 N. C., 4.
Lathrop v. *Swiger*, 39 Barb., 396.

B.

Section 914 does not apply.

Deimel v. *Stroheim*, 69 Fed., 987.
Lamaster v. *Keeler*, 123 U. S., 376.
In re Chateaugay Iron Co., 128 U. S., 544.
Ex parte Fisk, 113 U. S., 713.

The exact question arose in *McNutt* v. *Bland*, 2 How., 9, not only as to section 914, represented in that case by the much broader act of 1828, but also as to the intent and scope of such a state statute as the one here involved. It was held that such a statute was not intended and could not be made to be applicable to Federal process.

In re Freeman, 2 Curtis, 491.
Palmer v. *Allen*, 7 Cranch, 550.
Nudd v. *Burrows*, 91 U. S., 426.
Lincoln v. *Power*, 151 U S., 436.

C.

Sections 916 and 991 do not apply.

The former applies only to executions against the *property* of the judgment debtor; the latter only to discharge before a commissioner as an insolvent debtor.

III.

IF THE ILLINOIS STATUTES DO APPLY THERE WAS NO VALID GROUND OF DISCHARGE THEREUNDER.

The service of the *habeas corpus* writ merely suspended the imprisonment on the *capias ad satisfaciendum.*

Matson v. *Swanson*, 131 Ill., 255.

Therefore the *second* week's board was merely paid in advance. That is the only ground of complaint. The statute requiring that the prisoner's board shall be "advanced" at the commencement of each week is complied with by payment any time in advance of the first of the week.

Powder Co. v. *Burkhardt*, 97 U. S., 110, 117.

The construction put upon the Illinois act by the Circuit Court was too strict, that act being in derogation of the common law. That act being copied from the Lord's act should not be more strictly construed than was the Lord's act. As to the construction of the Lord's act, see

Beech v. *Paxton*, Barnes, 367.
Leach v. *Pargiter*, Douglas, 68.
Shaw v. *Gimbert*, Barnes, 369.
Parker v. *Harvey*, Barnes, 395.
In re Franklyn, note, 5 Durnf. and East., p. 36.

IV.

THE PRISONER HAD NOT COMPLIED WITH THE TERMS OF THE ILLINOIS STATUTES AS TO DISCHARGE.

Sec. 65, Chap. 77 Rev. Stat. Ill. (Appendix, p. 20.)

Sec. 34, Chap. 72, Rev. Stat. Ill. (Appendix, p. 17.)

ARGUMENT.

Jurisdiction.

Necessarily, the first question involved is that of jurisdiction.

It is submitted that where a case has gone to final judgment and final process has been issued, there is no manner of attacking such final process upon facts alleged to have happened since final judgment and the issuance of process, except by means of the writ of *audita querela*.

The authorities show that the proper remedy under the circumstances of the case at bar is by *audita querela*. It is not proper that the questions of fact involved in the issue in such a case as to payment or not should be decided upon a casual oral motion.

In *Commonwealth* v. *Whitney*, 10 Pick, 434–438, the Court says:

"The Court are not prepared to say that the imprison-
"ment was unlawful, so as to entitle the prisoner to his
"discharge forthwith, as a matter of right, but if it was,

"*he has his remedy by writ of audita querela, in which* "*the facts could be put in issue and the rights of the* "*parties more regularly settled.*"

See, also,

Brackett v. *Winslow*, 17 Mass., 153.
Brooks v. *Hunt*, 17 Johns., 484–486.

But the question of jurisdiction is not limited to the form in which the discharge was sought in this case.

The prisoner was in a *state* jail, in the custody of a *state jailer*. He sought discharge under and by virtue of the provisions contained in 30th section of chapter 72 of the Revised Statutes of Illinois.

Section 1 of that chapter, which is "An Act concerning "*insolvent debtors*, approved April 10, 1872," reads as follows:

"That *the County Courts* shall have EXCLUSIVE *original* "*jurisdiction* in their respective counties in ALL applica- "tions *for discharge* from arrest or imprisonment *under* "*the provisions of this act.*"

Section 990 of the Revised Statutes of the United States, upon which alone the Circuit Court relied to give force to the state statute declares:

"And *all* modifications, *conditions* and *restrictions* "upon imprisonment for *debt*, provided by the laws of "any state, shall be applicable to the process issuing from "the Courts of the United States to be executed therein, "AND THE SAME COURSE OF PROCEEDINGS SHALL BE "ADOPTED THEREIN AS MAY BE ADOPTED IN THE COURTS "OF SUCH STATE."

The state statute is clear that *all* applications for discharge, based upon any of the provisions of the insolvent debtor's act, must be made to the County Court of the county. To that Court alone the officer having the writ and the prisoner is subject.

A reading of *Duncan* v. *Darst*, 1 How., 304, and *McNutt* v. *Bland*, 2 How., 1, makes it clear that *if the state statute applies at all*, it must apply *in toto*, and the "course of proceedings" therein prescribed for obtaining a discharge strictly followed. The Circuit Court, therefore, had no jurisdiction to entertain or grant the motion of Deimel for discharge because such motion is not in accord with the procedure prescribed by the state statute.

The Merits.

Aside from the question of jurisdiction, this case involves substantially the same questions which were presented and disposed of in this Court upon the former appeal herein. (*Deimel et al.* v. *Stroheim et al.*, No. 228, Oct. Term, 1894) and in *United States* v. *Arnold*, (No. 221, Oct. Term, 1894), one opinion being filed in both of these cases. (69 Fed. Rep., 987.)

In this Court, as in the Circuit Court, the plaintiffs in error are entitled to the full benefit of that opinion, not only as a precedent, but as *the law of this case*, which, whether right or wrong, should have controlled the Circuit Court, and is binding upon this Court.

For while it is proper, where a decision is clearly wrong, for a Court to overrule it in subsequent cases, in the same case, even the fact that error may be manifest in the prior decision does not authorize a reversal of a former ruling.

In Wells on *Res Adjudicata* and *Stare Decisis*, § 613, the rule is thus stated:

"It is a settled principle that the *questions of law* de-
"cided on appeal to a Court of ultimate resort, must
"govern the case in the same Court, and the trial Court,

"through *all subsequent steps of the proceedings*, and "will seldom be reconsidered or reversed, *even if they* "*appear to have been erroneous.* A previous ruling by "the Appellate Court upon a point distinctly made may "be only authority in other cases, to be followed, or "affirmed, or to be modified, or overruled, according to "its intrinsic merits, but in the case in which it is made "*it is more than authority;* it is a final adjudication, "from the consequences of which the Court cannot de-"part, nor the parties relieve themselves," (citing *Phelan* v. *San Francisco*, 20 Cal., 45) "and that, too, "notwithstanding the prior decision may be in abroga-"tion of one of the plainest principles of law."

23 Am. and Eng. Enc'y Law, p. 31, says:

"The same or similar principles control in the con-"struction of constitutions and statutes as apply in fol-"lowing precedents on any special or general principles "of the common law. It is generally held that the doc-"trine of *stare decisis* applies equally to cases of inter-"pretation and construction of constitutions and of stat-"utes." * * * P. 33. "Where a decision is given "by a Court of ultimate appeal in any case, that decision "must be regarded as conclusive in that particular case. "Where a question arises in a case similar to one already "adjudicated in a prior case, while the force of prece-"dent is strong, the Court may overrule, affirm or mod-"ify any previous decision. *In the same case any rul-"ing is final*, in a different one it is only the precedent "established, and, while Courts are reluctant to disregard "previous decisions in similar cases, there may be a va-"riety of reasons which will cause them to do it. *This "general distinction exists, and must be recognized, no "matter how palpable the error or unfortunate the cir-"cumstances. It is one over which the court itself has no "control.*"

The Circuit Court, of course, realized the binding force of the former decision of this Court, but attempted to escape it upon grounds which, it is submitted, are not sound, and cannot excuse the refusal to follow the opinion of this Court.

This case turns, as did the others upon the construction of sections 990, 991, 914 and 916 of the Revised Statutes of the United States. For, as this Court said on the former appeal, "if state legislation has any bearing, "it is because Congress has so provided"; and these sections are the only ones wherein Congress has touched the subject under discussion. For convenience by reason of repeated references thereto, the several Federal and state statutes involved are bound up in an appendix hereto.

II.

SECTION 990.

The opinion of the Circuit Court is based upon section 990, Rev. Stat. U. S., alone, that Court conceding that none of the other acts of Congress adopts such state legislation as the Illinois statute concerning jail fees and board involved in this case.

The learned judge of the Circuit Court construed the words of section 990, "imprisonment for debt," as including imprisonment in actions *ex delicto*. It is conceded in the opinion of the Circuit Court (Rec., 28) that this construction is contrary to that placed upon section 990 in the opinion of this Court on the former appeal. But the Circuit Court asserts that the construction of section 990 was not involved in that appeal, and that, even if it were involved, there are other reasons than those given in the opinion of this Court which made section 990 inapplicable to that case. That is to say, the learned circuit Judge insists that while this Court was right in holding that section 990 did not apply on the former appeal, the reasons it gave and the construction it put upon 990 in

reaching that conclusion were erroneous and not binding upon the Circuit Court. There seems to be somewhat the same misunderstanding in the present case as existed in *Atty. General* v. *Lum*, 2 Wis., 514, where the court says:

"This *opinion* of the Supreme Court, pronounced by "the Chief Justice, would seem to be conclusive as to the "right here sought to be enforced. But it is contended "that the opinions pronounced by the Supreme Court are "not of binding authority upon the Circuit Court, and it "is intimated that, though inferior Courts may treat such "opinions never so contemptuously, yet the mere *remit-* "*titur* certified and transmitted by our clerk is the only "authoritative direction to the Court below.

"This is not the correct view of the law. It is not in- "tended to be declared that all the reasoning and in- "stances of illustration introduced into an opinion of this "court are to be adopted by inferior tribunals from which "cases or matters may come here by appeal, writ of error "or otherwise; but it is insisted and declared that *the* "*opinion of this Court upon the points in judgment*, pre- "sented and passed upon in cases brought here for adju- "dication, are the law of the land until overruled or "otherwise annulled, and that inferior Courts and tribu- "nals must yield obedience to the law thus declared."

The learned judge of the Circuit Court was convinced that this Court had not laid down its construction of section 990 as a point involved in the former appeal, and, of course, if his conclusion is sound, the opinion of this Court was not binding beyond the force of an ordinary precedent as an expression of opinion.

But it is submitted that the construction of section 990 by this Court was essential to the decision upon the former appeal, to the full extent of the language used in the opinion of this Court; that the reasons given by this Court for holding section 990 inapplicable upon the former appeal are the only grounds that would sustain the decision in that case, and that the construction given section 990

by this Court is sound law. The circuit judge insists (Rec., 20) that the Illinois statute as to imprisonment upon a judgment where the issues of fact are not tried by a jury, is a mere limitation upon the power of the trial judge and is a determination of the *rights* of the litigants, rather than a regulation of practice, pleading or procedure. That therefore section 914 was not applicable thereto. He further declares that *that* Illinois statute was not a modification, condition or restriction on imprisonment for debt in the sense of section 990 (Rec., 21), but afterwards contradicts this statement and adds:

"The state enactment already quoted is indeed a modi-
"fication, condition or restriction 'upon imprisonment
"for debt,' but not a modification, condition or restric-
"tion which in the nature of things can be applicable
"to the process issuing from the Courts of the United
"States or to the process issuing from any Court."

In discussing section 990 the learned circuit judge proceeds (Rec., 28):

"It is said that the opinion of the Court of appeals on
"the motion to quash contains a dictum to the effect
"that section 990 does not refer to imprisonments on
"judgments *ex delicto. For reasons given in this*
"*opinion, I doubt if the point were material to the de-*
"*cision in the Court of Appeals.*"

The reasons given are those quoted. It is submitted that they are unsound. The circuit judge concedes that the Illinois statute involved in the former appeal was a modification, condition or restriction upon imprisonment for debt. That being admitted, what ground could be found for denying that section 990 adopted it? Section 990 reads:

"No person shall be *imprisoned for debt* in any state
"on process issuing from a Court of the United States,
"where, by the laws of such state, imprisonment for
"debt has been or shall be abolished, and *all* modifica-

"tions, conditions and restrictions upon imprisonment "for debt, provided by the laws of any state, shall be "applicable to the process issuing from the Courts of the "United States to be executed therein, *and the same "course of proceedings shall be adopted therein as may be "adopted in the Courts of such state.*"

The learned circuit judge attempts to apply to section 990 the rule of construction which governs section 914, which only adopts state practice "as near as may be," and declares that the Illinois statute, because it requires a "course of proceedings" in the waiver of a jury trial different from that required generally by the Federal statutes is "inapplicable" to Federal process. That is a complete answer to the position on section 914, but does not touch section 990. Section 990 is not only mandatory as to *all* modifications, conditions and restrictions, but expressly provides that "*the same course of "proceedings shall be adopted* therein as may be adopted "in the Courts of such state."

It is clear, that, except the point raised on the former appeal that the Illinois statute there involved, being subsequent to the enactment of section 990 was not adopted by it, there is no ground whatever upon which section 990 could have been avoided on the former appeal except the one given by this Court, that it applied only to actions *ex contractu*. The Illinois statute involved on the former appeal was undoubtedly a modification, restriction or *condition* upon imprisonment. (See the statute quoted, Rec., 20.) If, therefore, section 990 applied to imprisonment upon judgments *ex delicto* there was no escape on the former appeal, other than the point as to the priority of section 990. This Court held that did not apply to imprisonment upon a judgment *ex delicto*. 69 Fed. Rep., 987.

It is evident, therefore, that the construction of section 990 as this Court construed it was the decision of a point material and utterly essential to the judgment of this Court.

That construction is the law of this case.

From what has been said it is evident that the distinction sought to be made by the learned circuit judge between the question of law involved in the former appeal and that here involved is not maintainable. He insists that on the former appeal the question of the application of the Illinois statute as to imprisonment where there was no trial by jury involved only questions of procedure prior to judgment and of the *right* to the writ of *capias ad satisfaciendum* and that that right is a *property right*, and says:

"The right of a creditor *to take* on execution the body "of his debtor is in the nature of a property right. This "right a statute or constitutional enactment abolishing "'imprisonment for debt' in effect takes from the "creditor. Such a statute, therefore, contains no more "than is expressed by, and necessarily included in its "terms. So construed, it cannot take from a plaintiff "in tort the right to seize the defendant *on execution*, "*for the claim sued on gives character to the case, and* "*that claim is not a debt.*"

Yet the learned judge says:

"But where a defendant has been taken in execution "on such a judgment in tort, and the question arises on "the application to his case of section 990 as comprehend- "ing such statutory provisions as sections 30 and 31, of "chapter 72 of the Revised Statutes of Illinois, the con- "struction favorable to personal liberty must be applied "to the words 'imprisonment for debt.' He is in fact "imprisoned for debt within the fair scope of these "words."

What is the distinction sought to be drawn by the learned judge?

He declares that it is the cause of action which authorized the imprisonment, that the judgment being merely the judicial establishment of the cause of action, the right to "seize the defendant on execution" arises from the character of the cause of action and the judgment. That inasmuch as the "claim is not a debt" the plaintiff has *a right to an execution* which is unaffected by statutes merely modifying or abolishing "imprisonment for debt."

But he asserts that when the *right to detain* the judgment debtor who is a tort feasor is involved, that then the judgment, which is up to and during the arrest a claim which is not a debt, its character being determined by the cause of action, becomes something different and is a "debt." The substance of this attempted distinction was strongly urged upon this Court in pages 14 and 15 of the petition for rehearing filed by defendant in error on the former appeal, and the same arguments advanced, and even the same statute as to poor convicts cited, which appear in the opinion of the circuit judge.

The distinction is one which does not exist. There is no difference in the character of a claim *ex delicto* before judgment and after judgment, or before and after arrest upon execution.

The impossibility of denying to the words "imprisonment for debt" in section 990, application to *all* state statutes, if it applies to *any* governing imprisonment upon judgments *ex delicto*, is evident. For the section reads "*all* modifications, conditions and restrictions upon im-"prisonment for debt."

The same rule, therefore, must be applied to restrictions

or conditions which come into force after arrest, as that which this Court has held governs in this case prior to arrest.

This Court said (69 Fed., 987–992), on the former appeal:

"Imprisonment for debt has been forbidden on process "issuing from a Court of the United States in any state "where by the local law imprisonment for debt has been "or shall be abolished, and all modifications, conditions "and restrictions upon *such imprisonment* provided by "the laws of any state are made applicable to Federal "process to be executed therein. (Rev. St., §990), "but 'imprisonment for debt,' *as used in this and like "statutory or constitutional provisions* MEANS DEBTS "ARISING OUT OF CONTRACT, AND DOES NOT EXTEND TO "ACTIONS FOR TORT, nor to fines or penalties arising from "a violation of the penal laws of the state." (Citing cases.)

Under the unyielding rule as to *the law of the case*, further discussion would seem to be precluded.

But as the Circuit Court has attacked this court's construction of section 990, and as counsel for defendant in error insisted below that both Courts were in error as to sections 914 and 991, the arguments presented upon the former hearings will, for convenience of reference, be repeated here.

In the first place the distinction attempted to be made as to the judgment *ex delicto* becoming a debt after process has issued is met on all fours by the case of *Moore* v. *Green*, 73 N. Car., 394 (cited by this court), in which the court says:

"The argument is this: The moment a judgment "shall be obtained, the claim for damages is converted "into a debt; the person of the defendant is thereupon "liberated and his bail discharged. For what purpose, "then, require bail, who are to be discharged at the first

"moment when their liability can be of any value? It "is an oppression to the defendant, and of no possible "benefit to the plaintiff. *Dellinger* v. *Tweed*, 66 N. "Car., 206, is cited as the authority for the proposition "that the claim for damages is converted into a debt, "within the meaning of the constitution, by the recovery "of judgment. Undoubtedly, for some purposes it is. "An action of debt may be maintained on it, and a *fi. fa.* "may issue on it. But to construe the above cited "clause of the bill of rights (abolishing imprisonment for "debt) as forbidding imprisonment for any cause of ac- "tion which, by judgment, would become a debt, would "make its prohibition extend to all cases, as every action "becomes a debt in one sense when a judgment is re- "covered on it. Chitty, in his standard work on pleading, "divides all actions into two great classes; those which "arise *ex contractu*, and those which arise *ex delicto*. "No doubt the framers of the constitution had this fami- "liar classification in mind, and in forbidding imprison- "ment for debt, they referred rather to the cause of action "as being *ex contractu*, than to the form it would assume "upon a judgment. *If they had meant to forbid imprison- "ment in every civil action, they would have said so.* "But by forbidding it *for debt*, they plainly imply "that it may be allowed *in actions which are not for debt*. "In forbidding imprisonment for debt, as popularly "understood, viz.: for a cause of action arising *ex con- "tractu*, they responded to the general public sentiment, "but I know of no writer on the reform of the law who "has recommended the abolition of punishment for tres- "passers and wrongdoers. Such a provision might be "humane to the injuring, but it would not be so to the "injured parties. It would withdraw from the state its "power to impose a wholesome check on violence and "wrong, and would tend to license disorders and law "breakings incompatible with the peace and welfare of "society."

The same rule restricting the benefits of enactments modifying imprisonment for debt has long existed in Illinois.

In *Rich* v. *People*, 66 Ill., p. 513 (1873), the Supreme Court says:

"The fact that this Court has held that such a prose-
"cution as the present is a civil as distinguished from a
"strictly criminal prosecution does not affect the true con-
"struction of the constitution. *An action for a tort is a*
"*civil proceeding*, and yet this Court held that this pro-
"vision of the constitution has *no application to actions*
"*for torts*. *McKindley* v. *Rising*, 28 Ill., 337."

The construction of section 990 depends upon the meaning of the terms "imprisonment for debt" *in December, 1873*, when these words were adopted as part of section 990. Between 1800 and 1873 there were numerous statutes enacted in the several states for the abolition, restriction, or amelioration of the conditions and circumstances of imprisonment upon judgments in actions *ex contractu*. The statutes and constitutional provisions affecting these changes usually contained the terms "im-
"prisonment for debt," and these terms so used were, before 1873, and have been since that date uniformly construed as referring only to imprisonment upon judgments in actions *ex contractu*. For while leniency was generously extended to the unfortunate but honest debtor, there was no uncertain declaration by both Federal and state Courts that the fraudulent and tortious could not claim the benefit of these enactments granting relief to the "honest but unlucky."

In Illinois this rule was applied in *1853* in *People* v. *Cotton*, 14 Ill., 414, in which the Court says of the constitutional prohibition of imprisonment for debt.

"This prohibition applies only to action for contracts,
"express or implied. *It does not extend to actions for*
"*torts*. The design is to relieve debtors from imprison-
"ment, who are unable to perform their engagements.
"They are exempt from arrest, *if they act in good faith to*
"*their creditors*."

The rule was affirmed in practically the same language in *1862* in *McKindley* v. *Rising*, 28 Ill., 337–343, and again asserted in *January*, *1867*, in *People* v. *Greer*, 43 Ill., 213. See also the rule as commented upon in *Kennedy* v. *People*, 122 Ill., 649, where the Court says:

"We have held that the prohibition of the constitu-
"tion applies to actions upon contracts, express or im-
"plied. Its design is to relieve debtors from im-
"prisonment who are unable to perform their engage-
"ments. They are exempt from arrest if they act in
"good faith toward their creditors. *The prohibition*
"*does not extend to actions for tort, nor to fines or penal-*
"*ties arising from a violation of the penal laws of this*
"*state.* It has reference to debts arising *ex contractu.*"
Citing cases.

In *McCool* v. *State*, 23 Ind., 127, 131, the same construction of the words "imprisonment for debt" was laid down in *1864*.

Other instances might be given; but inasmuch as this same construction was placed upon these words in *1867* in *U. S.* v. *Walsh*, 1 Abb. C. C., 66 (Fed. Case, No. 16,-635), and in *April*, *1871* in *Hanson* v. *Fowle*, 1 Sawy., 497 (Fed. Case, No. 6,041), the meaning which Congress gave these words in *December*, *1873*, cannot be doubted. In this last case Deady, J., says:

"Counsel for defendants also argued that an arrest for
"an injury to the person was not allowed by the law of
"this state, and therefore this arrest was not even with-
"in the authority of Admiralty, Rule 48. Of course,
"counsel admits that Sub. 1 of Section 106 above cited
"provides for an arrest of the defendant in an action
"for damages for an injury to the person, but he con-
"tends that this provision of the section is in conflict
"with Sub. 19 of Art. 1 of the constitution of the state,
"which declares: 'There shall be no imprisonment for
"'debt except in cases of fraud and absconding credi-
"'tors.'"

"In *U. S.* v. *Walsh*, 1 Abb. C. C., 66, it was held that "this clause of the constitution should be construed as if "it read: 'There shall be no imprisonment for debt "'arising upon contract, express or implied, except,' etc. "In support of this conclusion the Court said:

"'General or abstract declarations in bills of rights "'are necessarily brief and comprehensive in their terms. "'When applied to the details of the varied affairs of life, "'they must be construed with reference to the causes "'which produce them and the end sought to be ob-"'tained.

"'A person who wilfully injures another in personal "'property, or character, is liable therefor in damages. "'In some sense he may be called the debtor of the party "'injured, and the sum due for the injury a debt, but he "'is in fact a wrongdoer, a trespasser, and does not come "'within the reason of the rule which exempts an honest "'man from imprisonment, because he is pecuniarily una-"'ble to pay what he has promised. For instance, a "'person who wrongfully beats his neighbor, kills his ox "'or girdles his fruit trees, ought not to be considered in "'the same category as an unfortunate debtor.' And "this accords with the course of the common law, which "did not give process against the body either before or "after judgment, only in actions for wrongs accom-"plished with force; it being a rule that in actions *vi et* "*armis* a capias lay, and when a capias lay in process, a "capias *ad satisfaciendum* lay after judgment.

"Afterward a capias was given in actions of account "by the statute of Marlbridge, 52 Hen. III., Ch. 23, and "detinue by statute 25 Edw. III., Ch. 17, in case by "statute, 19 Hen. VII., Ch. 9," etc.

The following cases also decide that judgments in actions "*ex delicto*" are not embraced within the meaning of the words "imprisonment for debt."

Ex parte Bergman, 18 Nev., 331, 342.
Harris v. *Bridgers*, 57 Ga., 407.
Long v. *McLean*, 88 N. C., 4.
Lathrop v. *Swiger*, 39 Barb., 396.

There can be no doubt that there was a clear and generally recognized construction of the words "imprisonment for debt" prior to December, 1873, which excluded from their intent all cases of "imprisonment *ex delicto*, "for fraud."

Such construction by the state and Federal courts was, it must be presumed, adopted by Congress when it re-enacted in 1867 and 1873 the provisions as to "imprison- "ment for debt."

Endlich on Construction of Statutes, Section 367, says:

"The importance, in the construction of a statute, of "a comparison of the same with earlier statutes in "*pari materia*, has already been pointed out. A re- "course to such statutes, however, necessarily in- "volves a recourse to the construction placed upon "them by the courts, for such decisions become virtu- "ally a part of the law, and, aside from this considera- "tion, as the comparison of former acts in *pari materia* "proceeds upon and is justified and demanded by the "principle that the legislature cannot be presumed "ignorant of previous legislation, so a recourse to the "construction put by the Courts upon words used in such "acts is based upon the reasonable assumption that, "where the legislature has reproduced language upon "which a case has been decided, it must have known the "interpretation put upon them in that decision. * * * "Therefore, when the words of an old statute are either "transcribed into, or by reference made a part of a new "statute, this is understood to be done with the object "of adopting any legal interpretation which has been "put on them by the Courts. Section 368. * * * In "other words, the re-enactment of a statute which has "received a judicial construction in the same, or sub- "stantially the same terms, amounts to a legislative "adoption of such construction, whether such re-enact- "ment is by way of an isolated and independent statute, "of the incorporation of several former statutes into "one, or of their incorporation in a code or revision of

"statutes. * * * Section 369. But the rule is not "confined to statutes strictly *in pari materia*. Where "terms and modes of expression are employed in a new "statute which, at the time of its enactment, had ac- "quired, by judicial construction, a definite meaning and "application in a previous statute on the same subject, "or on one analogous to it, they are generally supposed "to be used in the same sense, and in the construction of "the latter act regard should be had to the known and "established interpretation of such terms and modes of "expression in the former."

See, also:

Reiche v. *Smythe*, 13 Wall., 163, 165.
Vane v. *Newcombe*, 132 U. S., 220, 235.
Stout v. *Board of Commissioners*, 107 Ind., 343–348.
U. S. v. *Mooney*, 116 U. S., 104–106.

Finally, if section 990 applies to *all* cases of imprisonment, why are the various provisions contained in section 992 and section 991 found in the statutes?

As said in *Moore* v. *Green*, 73 N. C., 394, *supra*, if Congress had meant to forbid imprisonment in every civil action, it would have said so. But by forbidding it for debt, it plainly implied that it may be allowed in actions which are not for debt.

III.

SECTION 914.

This Court says in *Deimel* v. *Stroheim*, 69 Fed., 987:

"Section 914, *known as the conformity act*, EVEN IF "IT HAD NOT BEEN DECLARED TO BE INAPPLICABLE TO "REMEDIES UPON JUDGMENTS, *Lamaster* v. *Keeler*, 123 "U. S., 376, COULD NOT BE DEEMED TO GIVE EFFECT TO "THIS STATUTE OF ILLINOIS. * * *"

If the decision of this Court of a point in a case is to be any guide in the subsequent conduct of the case, the contention cannot be sustained that section 914 has any application in this case. Counsel for Deimel relied below upon *Wayman* v. *Southard*, 10 Wheaton, 1, cited by this Court incidentally, in connection with the discussion of section 914. But an examination of *Wayman* v. *Southard* discloses the fact that its only possible relevancy in the discussion of section 914 is in the construction of the words "modes of proceeding," which, on the express ground that there was no other Federal legislation on the subject, were then, *in 1825*, construed as including steps taken in a case after judgment. (See act, 1792, Appendix, p. 3.) This statute construed in *Wayman* v. *Southard* is seen to have been a statute expressly referring to and seeking to regulate final process. But as decided in *Lamaster* v. *Keeler*, 123 U. S., 376, this construction cannot be applied to section 914. On comparing section 914 with sections 916, 990, 991, 992, the act of March 3, 1893, (27 Stat., at large, U. S., 751) regarding sales of realty on execution and other provisions as to final process, the mode of sale upon execution, etc., it becomes evident that section 914 is not the sole legislation upon "conformity," or the regulation generally of final process. That all of these various sections make provisions which are but co-ordinate parts of one plan, that section 914 applies up to and only up to the rendition of judgment, and that *the other sections alone* apply to the issuance, manner of execution of, and discharge from final process.

The Supreme Court has clearly declared that section 914 does not apply to any steps taken after judgment, and that it was intended thereby only to adopt code

pleadings and methods of trial. In order that no doubt may remain in the Court's mind that *Wayman* v. *Southard* does not apply to the construction of section 914 in this case, the Court's attention is asked to the extremely elaborate and scholarly brief submitted to the Supreme Court in *Lamaster* v. *Keeler*, 123 U. S., 376, in support of the contrary contention as to *Wayman* v. *Southard*. That brief is a fair statement of the position taken by counsel for defendants in error in the Court below. But the Supreme Court refused to construe section 914 as *Wayman* v. *Southard* had construed the former broader act, and said:

"This section (914) is a re-enactment of section 5 of "the act of June 1, 1872, 'to further the administration "'of justice' (17 Stat., 196), * * * (referring to "former statutes). In *Wayman* v. *Southard*, 10 Wheat., "1, these statutes were considered and construed by this "Court; and in giving a meaning to the language, 'forms "'and modes of proceeding in suits,' the Court, speaking "by Chief Justice MARSHALL, said that it 'embraces the "'whole progress of the suit, and every transaction in it "'from its commencement to its termination, which has "'been already shown not to take place until the judg-"'ment shall be satisfied. It may then and ought to be "'understood as prescribing the conduct of the officer in "'the execution of process, that being a part of 'the "'proceedings in the suit.' 10 Wheat., 32.

"There would, therefore, be good reason for the con-"tention of the plaintiff below that the general words of "section 914 of the revised statutes, 'forms and modes "'of proceeding,' apply to proceedings for the enforce-"ment of judgments as well as to proceedings before the "judgments were rendered, *but for the provisions* of sec-"tion 916, which is section 6 of the same act of June 1, "1872, from which section 914 was taken.

"*This section shows that in pursuing the remedies for "the enforcement of a judgment in a common law cause, "recovered in a Federal Court, the 'forms and modes of "'proceeding,' provided for the enforcement of a like*

"*judgment are not to be followed*, unless they "were prescribed by the law of the state at "the time the provisions of the section took "effect; or, if subsequently prescribed by such "law, until they have been adopted by a general "rule of the Court. *In providing for remedies upon* "*judgments, the section not only excludes the application* "*of the provisions of Sec. 914 to such remedies, but also* "*indicates the extent to which remedies upon judgments* "*furnished by state laws may be used in the Federal* "*Courts.* Congress, which alone can determine the rem- "edies which may be pursued for the enforcement of "judgments in the Federal Courts, as well as the pro- "cedure to be adopted in the progress of a suit, has de- "clared its will with respect to both. The procedure in "civil causes, other than those in equity and admiralty, "from their commencement to final judgment, must con- "form, as near as may be, to the procedure existing at "the time in like causes in the Courts of record in the "state in which the Federal Courts are held. It must, "therefore, follow subsequent changes in the procedure "in like causes in the state Courts. But to enforce judg- "ments in common law causes, only such remedies can be "pursued 'as are now provided in like causes by the laws "'of the state;' that is, when the act of Congress on the "subject, the above section, was passed or re-enacted— "or, if provided by subsequent laws of the state, such as "have been adopted by the Federal Courts. *It matters* "*not that the remedies designated in Sec. 916 are stated* "*to be, to reach by execution or otherwise the property of* "*the judgment debtor; and that proceedings under the* "*stay law of Nebraska are only to secure, where a stay is* "*obtained, the personal liability of the sureties for the* "*amount of the judgment.* IN THE ABSENCE OF A DESIG- "NATION OF ANY OTHER REMEDIES, THE SECTION IS A "DECLARATION THAT UNTIL ADOPTED BY A RULE OF THE "COURT, NO OTHER REMEDIES PRESCRIBED BY STATE LAWS "SHALL BE PERMITTED IN THE FEDERAL COURTS. THE "EXTENT TO WHICH THE AUTHORITY of the Federal Courts "may go, in the enforcement of judgments, by resort to "remedies provided by state laws in similar cases, is thus "defined and limited."

The same construction of Sec. 914 is found *in re Chateaugay Iron Co., Petitioner*, 128 U. S., 544, where the Court says, page 554:

"In *Indianapolis Railroad Co.* v. *Horst*, 93 U. S., "291, a state statute prescribed that the judge should "require the jury to answer special interrogatories in ad- "dition to finding a general verdict. This Court held "that that provision did not apply to the Courts "of the United States; and that the act of Con- "gress did not apply to a motion for a new trial, nor "affect the power of the Circuit Court to grant or refuse "a new trial in its discretion. This last point was again "so ruled in *Newcomb* v. *Wood*, 97 U. S., 581. *In har-* "*mony with the foregoing decisions we are of opinion* "*that Sec. 914 does not extend to the means of* ENFORC- "ING *or revising a decision once made by the Circuit* "*Court.* Section 914 does not extend to proceedings to "enforce a judgment, because by Sec. 916 special pro- "visions are made as to a remedy by execution or other- "wise, to reach the property of a judgment debtor, by "borrowing from the laws of the state only those reme- "dies then already existing, or which should thereafter be "adopted by general rules of the Circuit Court. *La-* "*master* v. *Keeler*, 123 U. S., 376. The object of Sec. "914 was to assimilate the form and manner in which "the parties should present their claims and defense, in the "preparation for the trial of suits in the Federal Courts, "to those prevailing in the Courts of the state. As we "have seen, it does not include state statutes requiring "instructions to the jury to be reduced to writing, or "those which permit such instructions and certain papers "read in evidence, to be taken by the jury when they "retire, or those which require the jury to be directed, "if they return a general verdict, to find specially upon "particular questions of fact involved in the issues; and, "as it does not apply to a motion for a new trial, nor "affect the power of the Circuit Court to grant or refuse "a new trial at its discretion, so it *does not cover any* "*other means of enforcing or revising a decision once* "*made by the Circuit Court.*"

It is thus evident that section 914 is not a residuary clause, creating "conformity" in all cases which sections 916, 990, 991, 992, etc., do not embrace. If *general* and *complete* uniformity was intended by Congress to be attained by section 914, those other sections would be superfluous. For example, the provisions of the state law of Nebraska, not being a means of reaching *the property of the debtor*, could in no event come under section 916. Yet the Supreme Court held emphatically that that did not make section 914 applicable. The principle here involved is this: where Congress has legislated *at all*, upon the *general* subject-matter, the whole subject-matter is removed from the influence of section 914, whether the particular point in question is or is not covered by the other legislation.

Ex parte Fisk, 113 U. S., 713.
Parsons v. *Redford*, 3 Pet., 433.
Nudd v. *Burrows*, 91 U. S., 425, 441.
Easton v. *Hodges*, 7 Biss., 324. Fed. Cases, No. 4258.

Inasmuch, therefore, as Congress has provided for discharge from arrest upon a *capias ad satisfaciendum* only to the limited extent provided by section 991, which provides only for a discharge under insolvent debtor's proceedings, and has regulated the custody of prisoners by the marshal or jailer by section 992 only, it is clear that the attention of Congress has been directed to the subject-matter, and that it has acted thereon, and in such case section 914 does not apply.

But aside from the fact that section 914 is thus narrower in its construction than were the statutes construed in *Wayman* v. *Southard*, the Supreme Court has expressly

held *that even when the acts construed in that case were in force, Congress had not thereby adopted state laws requiring a creditor to pay the board and jail fees of the debtor.*

It is evident that such state statutes are a regulation of a matter which is not one of practice, or of form or mode of proceeding.

In *McNutt* v. *Bland*, 2 How., 9, the precise question involved in this case was discussed and decided. In that case the prisoner had been arrested by the marshal and imprisoned in the state jail, upon a *capias ad satisfaciendum* issued upon a judgment in tort. Under the provisions of the statutes of Mississippi, the sheriff of the county, as jailer, was obligated to receive and detain the Federal prisoners. (Appendix, p. 14.) These statutory provisions of Mississippi were enacted in response to the resolution of 1787 of Congress, calling upon the states to afford means of detaining Federal prisoners in state jails. Sections 5 and 6 of chapter 75 of the Revised Statutes of Illinois (Appendix, p. 17), correspond to and are the same in intent and character as the Mississippi statutes. The Mississippi sheriff accordingly received and detained the Federal prisoners.

By this act of Mississippi, passed *June 22, 1822*, (before any act of Illinois on the subject) the creditor was bound to advance the prisoners' board. (Appendix, p. 10.) The creditor in *McNutt* v. *Bland* failed to do so, and the sheriff, laboring under the mistake that the state statute applied to Federal prisoners, discharged the prisoner upon a finding in the state Court, in a proceeding taken under the state statute, that the board had not been paid, and that the debtor had duly scheduled.

The creditor, however, insisted that the state law did not apply, and under the obligation of the sheriff's bond

and the state statutes as to Federal prisoners, sued the sheriff and his sureties on his bond, *for an escape*.

The Supreme Court held that the state statute did not apply as to board or as to discharge under the special proceedings thereby provided for, and that the sheriff was liable for an escape. So in this case the jailer of Will County will be liable under his bond, and the provisions of chapter 75, Ill. Rev. Stat., unless the bond given in this case (Rec., 32) and conditioned on surrender by the defendant in error in case of reversal on this hearing, serves to protect him.

McNutt v. *Bland* was decided in 1844 after the decision in *Wayman* v. *Southard*, construing the act of 1792, had been reinforced by the adoption of the act of May 19, 1828. (Appendix p. 3.) The language of this act is as emphatic and broad and as clearly inclusive of final process as could be possibly devised. For in section 3 thereof, final process is especially mentioned and *the proceedings* thereupon ordained to be the same as in the state Courts. Yet the Supreme Court held that, on the one hand Congress by the conformity acts did not intend to adopt this regulation by the state of the board of prisoners on final process, and on the other hand, that the state legislature did not intend that its provisions upon that subject should apply to Federal prisoners. The Court says, after disposing of an issue raised as to the form of action on the sheriff's bond:

"The next question arises on the defendants' first plea "in bar, which sets up a discharge of the prisoner by "the sheriff, in default of the plaintiff in the execution "paying the prison fees due, pursuant to the act of 22nd "June, 1822. Sects. 35, 47; Hut. and How., 640, 644. "*This law, by its own force, cannot apply to persons "committed on executions from the Courts of the United*

"*States, it must first be adopted by act of Congress, or* "*some rule of Court under the authority conferred on the* "*Courts of the United States by law.* It is a peculiar "municipal regulation, applicable and intended to apply "only to persons committed under state process, as "clearly appears by the 62nd section of the same law, in "the revised code, as to process of the United States. "How. and Hut., 649, 650. After reciting in full the "resolution of Congress relating to jails, passed in 1789, "1 Story, 70, it proceeds: 'And whereas, it is just and "'and reasonable to aid the United States therein, on "'the terms aforesaid, until other provisions shall be "'made in the premises, it is enacted, that all sheriffs, "'etc., within this state, to whom any person or per-"'sons shall be sent or committed by virtue of legal "'process, issued by or under the authority of the United "'States, shall be, and are hereby required to receive "'such prisoners into custody, and to keep the same "'safely until they shall be discharged by due course of "'law, and be liable to the same pains and penalties, and "'the parties aggrieved be entitled to the same reme-"'dies, as if such prisoners had been committed under "'the authority of the state. The sheriff may require "'of the marshal the fulfilment of the proposals of the "'general government, with regard to rent and suste-"'nance, at least quarter yearly; and on the discharge "'of the prisoner shall make a statement of charges, "'etc., to enable him to make his return to the proper "'department of the general government.'

"Taking this section of law in connection with the "resolution of 1789, there appears an evident intention "in the legislature that the law should cover the whole "resolution, so as to carry it into effect in all its parts "and provisions. Hence the terms in each must be made "to harmonize; whereby the phrase in the 62d section, "'and to keep the same safely until they shall be dis-"'charged by due course of law,' will be referred to the "corresponding phrase in the resolution, 'until they shall "'be discharged by due course of the law thereof,' (the "United States), so as to authorize no discharge by vir-"tue of any state law, incompatible with the resolution. "If any doubt could arise on those words in the resolu-

"tion, 'all prisoners committed under the authority of "the United States,' whether they applied to cases be- "tween individuals, it is removed by the explicit langu- "age of the law, 'any person or persons who shall be sent "'or committed by virtue of legal process, issued by, or "'under the authority of the United States,' &c., 'and "'the parties aggrieved shall be entitled to the same "'remedies,' &c., which necessarily embrace all cases, "civil or criminal.

"As it would be wholly inconsistent with this view of "the resolution and law, for the legislature to authorize "the sheriff to discharge any person from custody, other- "wise than by the due course of the laws of the United "States, we cannot attribute such an intention to them, "unless the words of their act clearly indicate it; but "there is nothing in the act to that effect, or any words "which admit of such construction. On the contrary, "as the resolution of Congress positively requires it, as "the preamble to the state law declares it to be 'just and "'reasonable to aid the United States herein,' the enact- "ing part must be taken accordingly; otherwise the "law would conflict with the resolution.

"The act of Congress passed in 1800 provides for the "mode of discharging insolvent debtors, committed un- "der process from the Courts of the United States, and "the cases in which it may be done; it is obligatory on "the sheriffs in every county of the states who have ac- "ceded to the resolution of 1789, and no discharge under "any state law not adopted by Congress, or a rule of "Courts can exonerate the officer. *Vide* 1 Story, 715; "3 Story, 1932, 1939; *Suydam* v. *Broadnax*, 14 Pet., "75; 10 Wheat., 36, 37. From the time of Palmer "and Allen, 7 Cranch, 554 to *Darst* v. *Duncan*, the lan- "guage and decisions of this court have been uniform "for more than forty years, that a state law, which is a "peculiar municipal regulation, not having any immedi- "ate relation to the progress of a suit, but imposing a "restraint on state officers in the execution of the process "of their Courts, is altogether inoperative upon the "officers of the United States in the execution of the "mandates which issue to them. By the process acts of "1789, 1792 and 1828, Congress has adopted such

"state laws as prescribe the modes of process and pro-
"ceedings in suits at common law, as are not in conflict
"with the laws of the United States, which can be exe-
"cuted by the Courts of the United States; which impose
"no restraint on, or obstruction of their process from its
"inception till ultimate satisfaction from the defendant,
"or the marshal, sheriff, or other officer, intrusted with
"its execution.' 3 Pet., 525; 10 Wheat., 40, 56, &c.
"'Congress, however, did not intend to defeat the exe-
"'cution of judgments rendered in the Courts of the
"'United States, but meant they should have full effect
"'by force of the state laws adopted, and therefore,
"'all state laws regulating proceedings affecting insolvent
"'persons,' or that are addressed to state Courts or mag-
"istrates, do not bind the Federal Courts, because they
"have no power to execute such laws. 1 How., 306;
"14 Pet., 74 S. P. For these reasons we are of opinion
"that the defendants' first plea is defective, in not set-
"ting forth a case which justifies the discharge of the
"person committed on the execution."

The act of 1800, referred to in the above opinion of the Supreme Court, regulated the discharge of *insolvent* DEBTORS as distinguished from tortfeasors (Appendix, pp. 4–6), and is now represented by the provisions of section 991, Revised Stat., U. S. (Appendix, p. 2.) The process acts of 1789, 1792 and 1828 also referred to by the Supreme Court are set out in the Appendix at pages 2–4, 6, respectively.

When it is considered that Illinois in response to the resolution of 1789 in regard to Federal prisoners enacted the statutes now embraced in chapter 75, Rev. Stat. Ill. (Appendix, pp. 17–20), it is clear that the decision in *McNutt* v. *Bland* is not only decisive beyond dispute as to section 914, but is an authoritative construction of the Mississippi statute, before the adoption of a similar statute in Illinois, which should therefore be construed in the same manner. The substantial adoption of a

statute adopts the constructions that have been placed thereon.

Hammond v. *People*, 32 Ill., 446, 452.
Endlich Interpretation Stat., § 371.
Wells *Stare Decisis*, § 590, p. 538.

The reasoning of *McNutt* v. *Bland* applies as well to the Illinois as to the Mississippi statutes, aside from any question as to the relation they bear to each other.

For the very fact that the General Assembly of Illinois considered it necessary to make special provisions as to the jail fees of Federal prisoners in chapter 75 (Rev. Stat. of Ill. of 1874), is clear evidence that it did not consider that such regulations as it made concerning the jail fees of its own prisoners would or could be applicable to Federal prisoners.

In the Illinois statutes, which were adopted to provide for the reception of Federal prisoners in the state jails in compliance with the request of the resolution of 1789 (Appendix, p. 17), there are such distinct provisions as to Federal prisoners' jail fees and board that the reasoning of *McNutt* v. *Bland* applies with more force to the state of facts existing in Illinois than to that existing in Mississippi.

The Illinois statute makes only the following conditions upon which the county sheriff, as the keeper of the state jail is bound to receive and safely keep all Federal prisoners:

"*Provided always*, the marshal or person delivering "such prisoner shall pay, or cause to be paid, for the "use and keeping of such jail, at the rate of fifty cents "per month for each person that shall, under their au- "thority, be committed thereto, and also to the jailer "such *fees* as he would be entitled to for like services

"rendered, in virtue of the existing laws of this state, "during the time such prisoner shall be therein confined, "*and, moreover, shall support such of the said prisoners* "*as shall be committed for offenses.*" (Appendix, p. 18)

The ordinary rule of statutory construction is that a proviso introducing one or more exceptions to an act negatives all other exceptions that might be urged.

Endlich Interpretation of Statutes, Sec. 397.

Ex parte McArdle, 7 Wall., 506.

Applying this rule, if the proviso above quoted is complied with, the sheriff of the county as jailer is bound to receive and safely keep Federal prisoners.

To add the conflicting sections from the insolvent debtor's act of Illinois to this proviso would be clearly inadmissible, and would result in confusion. For the statute as above seen, as to Federal prisoners requires *the marshal* or other officer to pay fees, support, etc., for the prisoner to the jailer; while the statute in question requires *the creditor* to pay the fees and board. (Appendix, p. 18.)

The regulations of this last statute are applicable only to state prisoners, state officers, state writs and state jails. Different fees, different officers, entirely different regulations have been been provided and are alone involved in the case of Federal prisoners.

To add such regulations as are contained in the insolvent debtor's act to those contained in chapter 75 as to the discharge of prisoners held under Federal writs would not be a compliance with the resolution of 1789. (Appendix, p. 19.) As pointed out in *McNutt* v. *Bland*, the state laws as to Federal prisoners must be construed

in view of and as a compliance with that resolution. The United States Revised Statutes in providing what charges the marshal shall pay for prisoners, etc. (Appendix, p. 24), recognize only such provisions as are contained in chapter 75, Rev. Stat. Ill.

It is submitted that *McNutt* v. *Bland* is beyond dispute authority, not only that such an act of Congress as section 914 does not adopt state laws as to process, but that such state laws as to process as those under discussion, do not and were not intended by either the state or the Federal legislative bodies to apply to Federal prisoners.

In reply to *McNutt* v. *Bland* the learned circuit judge says:

"My holding is that the requirement for the payment "by plaintiff of the debtor's board on the first day of "each week of his detention is not in Illinois a munici- "pal regulation for the guidance of state officials within "the sense of *Bland* v. *McNutt*, 2 Howard, 1; that said "requirement is a limitation on the plaintiff's right to de- "tain the debtor," etc. (Rec., 29.)

A comparison of the acts of Mississippi (Appendix, pp. 10 — 14) involved in *McNutt* v. *Bland*, and the acts of Illinois (Appendix, pp. 14 — 21) here involved shows that they are of exactly the same character. *McNutt* v. *Bland* is but one of a long line of Federal decisions holding that such statutes are mere municipal regulations which such acts of Congress as sections 914, 990 and 916 do not adopt.

These authorities are reviewed in the case *In re Freeman*, 2 Curtis, 491. Fed. Cases No. 5083, decided in 1855, when both the act of conformity as to process and forms and modes of proceeding of 1828 (Appendix, p. 6) and the acts of 1839 and 1841 as to uniformity in regard to "imprisonment for "debt" were in force.

In that case an act of Massachusetts (Appendix, pp. 7 — 9) was involved which provided for various proceedings similar to those provided by chapter 75, Rev. Stat. Ill. The acts of 1839 and 1841 were held inapplicable because the Massachusetts statute did not absolutely abolish imprisonment for debt, and was passed subsequent to the passage of the act of 1841. The act of 1828, which, so far as this controversy is concerned, is even broader than section 914 was held inapplicable, and the Court, by CURTIS, J., says:

"But it is true, that this law of Massachusetts does "allow imprisonment, *under certain restrictions and* "*conditions*, and this renders it necessary to inquire "whether the act of Congress has adopted those restric- "tions and conditions, and made them applicable to the "process of this Court. By the third section of the pro- "cess act of 1828 (4 Stat., 278), which was applicable "to all the states except Louisiana, it was provided that "'writs of execution and other final process, issued on "judgments and decrees AND THE PROCEEDINGS THERE- "UPON, shall be the same in each state respectively, as "are now used in the Courts of such state.' Under this "act, as well as under the prior acts of 1789 (1 Stat., 93) "and 1792 (1 Stat., 275), *though they were held to in-* "*clude in general, all the regulations incident to process*, "*yet it was also held that* THERE WERE CERTAIN REGU- "LATIONS MADE BY STATE LAWS CONCERNING THEIR PRO- "CESS, WHICH WERE NOT INTENDED TO BE ADOPTED.

"In *Palmer* v. *Allen*, 7 Cranch (11 U. S.), 550, it ap- "peared that the law of Connecticut did not allow a "debtor to be committed to jail on mesne process, with- "out a mittimus granted by a magistrate. The marshal "had committed a debtor to prison, under the authority "of a writ of *capias* and attachment issuing out of a "Court of the United States held in Connecticut, without "obtaining a mittimus from a magistrate. The Supreme "Court said, 'But it is equally clear to this Court, that "'the law above alluded to, commonly called the process "'act, does not adopt the law of Connecticut, which re-

" 'quires the mittimus in civil cases. This is *a peculiar* " '*municipal regulation* to the progress of a suit, but im- " 'posing a restraint on their state officers, in the execution " ' of the process of their Courts, and is altogether inopera- " ' tive upon the officers of the United States in the execu- " ' tion of the mandates which issue to them.' This decision " related to a state law concerning mesne process. *Bank* " *of U. S.* v. *Tyler*, 4 Pet. (29 U. S.), 366, brought " under review the effect of *the insolvent laws of the State* " *of Kentucky* upon a debtor committed on an execution " issuing from a Court of the United States; and a similar "question arose in *Duncan* v. *Darst*, 1 How., "301. *In these cases the Court held that the discharge* " *under the state laws was inoperative.* In *Boyle* v. " *Zacharie*, 6 Pet., 648, it was decided, that " though in Maryland, an injunction operated as a super- " sedeas of an execution, this regulation did not apply to " executions issuing out of the Courts of the United States. " And in *McNutt* v. *Bland*, 2 How. (43 U. S.), 9, it was " held, that a state law, which authorized the sheriff to "discharge a debtor from imprisonment, in default of " payment of prison fees, did not justify his discharge by " the sheriff from a jail to which he had been committed by " the marshal, on an execution issuing out of a Court of the " United States. The results of these decisions and princi- " ples on which they have been made, may be stated as fol- " lows: (1) That the adoption of state laws of pro- "ceeding, by Congress, though general, does not include "all state laws concerning process. (2) That among " others not included, are those which are addressed to " state Courts and magistrates, accompanied with grants of " power which enable them to execute such laws, which " powers the Courts of the United States do not possess " and cannot exercise."

Under the provisions of the Illinois statutes requiring schedules (Appendix pp. 17,18) there are regulations as to the form and taking of the oath and a penalty for perjury that cannot be enforced in the Federal Courts.

As section 914 is merely the expansion of the act of 1828 and similar prior conformity acts, the same rule of

construction, excluding peculiar municipal regulations from the scope of the act, must be applied. And a long line of cases upon section 914 do apply this same rule to it.

In *Nudd* v. *Burrows*, 91 U. S., 426, the Supreme Court says:

"It is declared by the act of Congress of June 1, 1872, "(17 Stat., 197, Sec. 5), 'that the practice, pleadings, "'and forms and modes of proceeding, in civil causes, "'other than equity and admiralty causes, in the Circuit "'and District Courts, shall conform as near as may be "'to the same things' existing at the time in the Courts "'of record of the state within which such Circuit and "'District Courts are held.'

"The purpose of the provision is apparent upon its "face. No analysis is necessary to reach it. It was to "bring about uniformity in the law of procedure in the "Federal and state Courts of the same locality. It had "its origin in the code enactments of many of the states. "While in the Federal tribunals the common law plead- "ings, forms and practice were adhered to, in the state "Courts of the same district the simpler forms of the "local code prevailed. This involved the necessity on "the part of the bar of studying two distinct systems of "remedial law, and of practicing according to the wholly "dissimilar requirements of both. The inconvenience of "such a state of things is obvious. The evil was a se- "rious one. It was the aim of the provision in question "to remove it. This was done by bringing about the "conformity in the Courts of the United States which it "prescribes. The remedy was complete. The personal "administration by the judge of his duties while sitting "upon the bench was not complained of. No one ob- "jected or sought a remedy in that direction.

"We see nothing in the act to warrant the conclusion "that it was intended to have such an application.

"If the proposition of the counsel for the plaintiff in "error be correct, the powers of the judge, as defined by "the common law, were largely trenched upon.

"A statute claimed to work this effect must be strictly

"construed. But no severity of construction is necessary "to harmonize the language employed with the view we "have expressed. The identity required is to be in 'the "'practice, pleadings, and forms and modes of proceed-"'ing.' The personal conduct and administration of the "judge in the discharge of his separate functions is, in "our judgment, neither PRACTICE, PLEADING NOR A FORM "nor MODE OF PROCEEDING within the meaning of those "terms as found in the context."

See, also,

Indianapolis R. R. Co. v. *Horst*, 93 U. S., 291, 299.

Lincoln v. *Power*, 151 U. S., 436, 443.

Phelps v. *Oaks*, 117 U. S., 236, 239.

Walker v. *Collins*, 59 Fed., 70.

Texas, etc., Ry. Co. v. *Nelson*, 50 Fed., 814.

By these authorities the rule is made manifect that no state statute which goes further than a mere regulation of the MODE of procedure is adopted. This was the clear holding of this Court upon the former appeal, and the Supreme Court, upon application for *certiorari*, refused to review that decision.

Yet, as the learned circuit judge says:

"The right of a creditor to take on execution the body "of his debtor is in the nature of a property right."

It is clear then that state statutes which, if applied, would strike the writ from the marshal's hands, or render it lame and ineffective, are not regulations of forms of procedure, but trench upon rights which are beyond the control of state legislation.

The Illinois statute provides that the board paid by the creditor to the jailer shall be indorsed on the execution

upon which the prisoner is held and "shall be charged "against and collected of the debtor as part of the costs "in the suit in which the writ is issued."

What authority does the marshal or the clerk of the Circuit Court have for the issuance and collection respectively of an execution for the amount so paid by a creditor? It further appears that the provisions of the insolvent debtors' act were intended to be pertinent to state prisoners and state debtors only, because the first section of the act provides:

"That the County Courts shall have *exclusive* original "jurisdiction in their respective counties in *all* applica- "tions for discharge from arrest or imprisonment *under* "*the provisions of this act.*" (See Appendix, p. 14.)

The sheriff or jailer is in the control of the County Court alone, and to that Court, and not to the Court whence the writ issued, must "*all* applications for dis- "charge from arrest or imprisonment under the provisions "of this act" be made.

Moreover, the prisoner must give notice to the creditor. (§ 3, Chap. 72, Appendix, p. 15.) He must be brought by the jailer before the county judge. (§ 4, Chap. 72, Appendix p. 15.) If he is arrested for fraud or concealment of property he is entitled to a jury trial under § 5, Chap. 72. (Appendix, p. 15.) But if not, as in this case, he must schedule under § 6, Chap. 72 (Appendix, p. 15), and make an assignment under §§ 8 to 22, etc., etc.

It is clear from an examination of the act that it is clearly a purely local, municipal regulation.

The authorities cited under this point are completely applicable. Contrary or conflicting cases cannot be found. They clearly establish two rules that dispose of this case.

First. Such conformity acts as that of 1828, or as section 914, do not adopt state regulations as to final process; *second*, even were the act of conformity such that its terms might be supposed to cover the state law, the state law being a "peculiar municipal regu- "lation, applicable and intended to apply only to persons "committed under state process" (*McNutt* v. *Bland*), will not be construed as adopted by Congress.

IV.

SECTIONS 916 AND 991.

Section 916, Rev. Stat. U. S. (Appendix, p. 1), applies only to remedies upon judgments against *the property* of judgment debtors. It merely declares that in the Federal Courts such forms of process as were then in force in the states could be enforced in the Federal Courts against *the property* of the judgment debtor. As there is no question that this does not cover remedies against *the body*, no discussion of the section is necessary. It is evident that in any event it does not apply to such a provision as to jail board and fees as the one under discussion.

Section 991, Rev. Stat. U. S. (Appendix, 2), evidently applies only to discharge under insolvent debtor's statutes, and such discharge can be obtained only in the the manner designated in the section, *i. e.*, by proceedings before a commissioner. This section cannot operate to impose the duty of the payment of board and jail fees upon the judgment creditor. It merely provides that the *manner of* discharge, *i. e.*, upon *insolvency* proceedings, shall be the same in the Federal as in the state Courts.

V.

THERE WAS NO VALID GROUND OF DISCHARGE UNDER THE ILLINOIS STATUTES, IF THEY APPLY.

As a matter of fact Deimel's board and jail fees for one week were paid when he was first arrested, on November 20, 1894. (Rec., 46, 47.) On the next day the imprisonment on the *capias ad satisfaciendum* was *suspended* by the service on the marshal of a writ of *habeas corpus*. (Rec., 44.) (Record in case No. 221; p. 13.)

In *Matson* v. *Swanson*, 131 Ill., 255, the action was upon a bond given upon the release of a debtor who had been arrested upon a *capias ad satisfaciendum* pending *habeas corpus* proceedings. Reversing the Appellate Court which held the bond void, the Supreme Court says:

"The reason expressed in the opinion, for which the "bond is held to be void, is, that there is no statute or "common law authority for setting at liberty, tempo- "rarily, on any form of security, one in custody under "valid final process in a civil case, except under the acts "concerning insolvents. * * * But our '*habeas cor-* "*pus* act' makes it the duty of Circuit Courts, and of the "judges thereof in vacation, upon proper petition, to "issue writs of *habeas corpus*, and allows them to there- "upon discharge from the custody of sheriffs prisoners "held by virtue of process from Courts legally consti- "tuted, in seven enumerated cases. Rev. Stat. 1874, "Chap. 65, Sec. 22. * * * *The moment the sheriff* "*received the writ of habeas corpus, the custody of peti-* "*tioner by virtue of the writ of capias ad satisfaciendum* "*terminated, and his custody, by virtue of the writ of* "*habeas corpus began, because the authority of all other* "*writs gives way and yields to the authority of that writ.* "* * * * *When, therefore, the petitioner gave the* "*bail he was not held under the writ of capias ad satis-* "*faciendum, but under the writ of habeas corpus, and so* "*it was the* act of the Court in ordering the writ of *habeas*

"*corpus*, and not the act of the sheriff in admitting him "to bail, that released him from custody under the for- "mer writ.

"*In re Kaine*, 14 How., 133; *Barton* v. *Clise*, "12 Wall., 400; *Pomeroy* v. *Sappsus*, 9 Ore., 363; "Hurd on Habeas Corpus, 324; 9 Am. and Eng. Ency. "of Law, 200, and cases cited. *And had the prayer "of the writ, on the hearing of the habeas corpus, been "denied, the petitioner would have been simply remitted "back to the custody of the sheriff, under the writ of ca- "pias ad satisfaciendum. King* v. *Bethel*, 5 Mod., 22. "Our conclusion therefore is, that the bond is not void."

In this case the prisoner was remanded on March 14, 1896. (Rec., 41.) Therefore, imprisonment on the *capias* was suspended from November 21, 1894, until March 14, 1896. As there was but one day of imprisonment under the *capias* in 1894, there were six days of the first week's imprisonment unexpired on March 14, 1896, so that on that date the board was paid up to March 20, 1896. The first week's board and jail fees were paid in November, 1894. (Rec., 47.) A week's board was paid March 13, 1896, with the express understanding that it was the second week's payment. (Rec., 44-46.) The board of Deimel was therefore paid in advance up to March 27.

The contention of Deimel, below, was that the "first "week" within the meaning of the statute ended on the service of the writ of *habeas corpus*, and that another week began March 14, 1896. That, therefore, on March 21, this new week ended, and that as no payment was made that day, he was entitled to a discharge.

It is submitted that this is not a reasonable or proper construction of the statute.

Arrests upon final process are frequent in the state Courts. They are very commonly questioned by *habeas corpus* proceedings which, as the statute requires, are

summarily disposed of. It is not the practice to consider the interruption of the *habeas corpus* proceedings, usually a matter of but one or two days as necessitating the computation of imprisonment upon a new reckoning as to weeks.

The state statute allows the prisoner to be confined but six months, provided he schedules. Certainly the day Deimel spent in jail in 1894 is to be counted in this six months. Why, then, is it not to be counted in the first week?

The case then, presented by the record, is not of a delayed payment, but of a payment on March 13 for the week commencing March 20. Counsel for Deimel insist that such prepayment is as fatal as payment too late. Such prepayment it is submitted is full compliance with the terms of the statute of the State of Illinois.

The statute requires, either to protect the jailer who furnishes food or the prisoner who needs it, that the creditor shall "*advance*" at the commencement of each week a week's board and jail fees.

In this case the second week's board, although paid March 13, was clearly under the directions as to its application (Rec., 44-46) "advanced" for the second week's board.

As specifically defined by Webster, "to advance" means, "a giving beforehand, a FURNISHING of some-"thing, before an equivalent is received."

In *Powder Co.* v. *Burkhardt*, 97 U. S., 110, 117, the Supreme Court says:

"To advance is to 'supply beforehand,' 'to loan be-"fore the work is done or the goods made.' This is the "popular understanding of the language as well as the "accurate definition."

Conformity acts are not passed in order to adopt technical rules, so impossible of observance that they defeat entirely any recourse to the remedy to which they apply. A *nisi prius* decision of a then recently elected judge, upon which the Circuit Court relied, held that payment one day before the commencement of the week was ground of discharge, and that *the payment must be made by the judgment creditor in person*. Since the decision of the motion here questioned, the Circuit Court has been asked to follow the holding about paying in person, in the case of Joseph Deimel (the original co-defendant of defendant in error), but the proposition was so absurd, that the necessarily non-resident plaintiff should be compelled to attend weekly at the remote jail in Will County, that the Circuit Court promptly rejected that part of the decision of the state *nisi prius* court. It is submitted that it was equally absurd to hold such prepayment as was here made, a breach of the requirements of the statute of Illinois. It is not reasonable or just to hold that a non-resident may not avoid risk of delays in transmission and failure to advance the necessary money by the commencement of the week, by sending the required amount a few days in advance. The learned circuit judge based his decision that the board and jail fees must be *paid* on the exact day, on an opinion by Judge Collins printed in 19 Chicago Legal News, 177.

That opinion is not sound law. Judge Collins quotes the following rules for the construction of statutes from Lord MANSFIELD:

"That whether the statute was mandatory or not de-
"pended upon whether the thing directed to be done was
"of the essence of the thing required."

From Potter's Dwarris, 226 n.:

"In general, it may be laid down as a rule that when
"a statute directs certain proceedings to be done in a

"certain way, or at a certain time, and the form or period "does not appear essential to the judicial mind, the law "will be regarded as directory, and the proceedings un- "der it will be held valid, though the command of the "statute as to form and time has not been strictly obeyed, "*the time and manner not being the essence of the thing* "*required to* be done."

From Holt, C. J., P. D., 262, 12 Mod., 513:

"Let a statute be ever so charitable, if it give away "the property of the subject, it ought to be construed "strictly."

Judge COLLINS also held that the act of 1845 of Illinois which regulated jail fees, is the "first act passed in "this state for the relief of insolvents in actions in tort, "*taken* largely from the Lords act, 32 year, George II."

The amendment of 1853 merely changed the provision that the board and jail fees should be paid each Monday to one that they should be advanced at the commencement of each week. In the revision, wherein this act of 1853 was incorporated in the insolvent debtors act in the form it now has as sections 30 and 31 of chapter 72, Revised Statutes, Illinois, the substance of the act of 1853 is retained.

With these premises Judge Collins proceeds to an erroneous view of the law, partly because he disregards his premises, partly because he fails to observe that the right to a *capias* in Illinois was a common law right, and partly because he misapplies the rule that the liberty of the subject is to be favored in construing statutes restricting it.

Judge Collins disregards his premises in holding that one day's *prepayment* entitles the prisoner to discharge, because, as has been seen, the "essence of the thing re- "quired to be done" is merely that provision shall be made for the board of the prisoner at the expense of the

creditor. This provision is as effectually made by payment in advance of the first day of the week as if it is made exactly on the first day of the week.

Secondly, Judge Collins shows that the Illinois statute is taken from the Lords act, so called (32 George II, ch. 28, § 13).

The learned Circuit judge in his opinion in this case says of Judge Collins opinion:

"It is grounded on English precedents under the Lord's "act, such as the anonymous case at page 102 in Sayer's "reports, *Fisher* v. *Bull*, 5 Durnf. & East., 36; *Rex* v. "*Wilkinson*, 7 Durnf. & East., 156, and on the rules as "laid down in the first volume of Tidd's Practice, at "page 382."

On the contrary, the construction of the Lord's act by the English Courts did not require payment upon the exact day without exception, and receipt of the board by the prisoner was a waiver of any irregularity in the time or manner of payment.

The Lord's act is too voluminous to reprint, but its provisions are fairly stated in 1 Tidd's Practice, p. 376 and following, as follows:

The creditor who has been arrested gives notice of his intention to take the benefit of the Lord's act to his creditors, and presents a petition, a schedule and assignment of all his property. Unless the creditors show the schedule and assignment to be fraudulent or insufficient the prisoner is discharged "unless the creditor insist upon his "being detained in prison, and shall agree in writing, "signed by his name or mark (or if he be out of England, "under the hand of his attorney) to *pay and allow the* "*prisoner* weekly, a sum not exceeding 3s 6d (or if more "creditors than one insist on his detention, not exceeding "2s a week each) to be *paid* on *Monday* in every week, "so long as the prisoner shall continue in execution; and

"in every such case, the prisoner shall be remanded. "And the Court has no power to moderate the sum to "be paid to a prisoner, or his being remanded, but a note "must be signed for the full sum directed by the act. "But if failure be made in payment of the said weekly "sums, the prisoner, upon application to the Court in "term time, or in vacation to a judge, *may*, by order of "the Court or judge, be discharged out of custody, *upon* "*executing an assignment and conveyance of his estate* "*and effects.*"

The learned Circuit judge cites only three cases besides the opinion of Judge Collins, and in none of them is there any holding that *prepayment* is a valid ground for discharge. In *Rex* v. *Wilkinson*, 7 Durnf. & East., 156, the only question was, there being two judgment creditors, whether the note of but one for only 3s 6d per week was sufficient. As the act plainly required the note of each for 2s each, the prisoner was discharged.

In *Anonymous*, Sayer, 102, the remanding was March 31, *the first week's board was paid April 4*, and the court held it related back, but the second week's board, which should have been paid April 7, *was not tendered at all*, there merely being a payment April 14 for the third week. The creditor, apparently thinking that he did not have to pay for the first week, and that the payments April 4 and 14 paid the second and third weeks. Of course, the prisoner was discharged.

In *Fisher* v. *Bull*, 5 Durnf. & East., 36, the payment was tendered too late and to the wrong jailer, *and refused by the prisoner*. The court clearly intimated that acceptance by the prisoner of the board would have precluded his discharge.

In I Tidds Practice, 382, there is nothing in addition to the citation of these cases.

That the Lord's act was not construed as strictly as contended for is evident from the following cases:

In *Beech* v. *Paxton*, Barnes, 367, where payment was to have been made Monday, it was held that payment Tuesday was sufficient.

In *Shaw* v. *Gimbert*, Barnes, 369, where payment should have been made Monday it was made Friday, and a discharge refused, because there was no showing that there was willful default.

In *Parker* v. *Harvey*, Barnes, 395, the court says:

"A mistake is not to be taken advantage of if the "the tender be recent."

In *Leach* v. *Pargiter*, Douglas, 68, a case arose where a payment was made and accepted on Wednesday, which should have been made on Monday. One judge discharged the prisoner in vacation. Lord MANSFIELD said, when asked to review the order:

"In the present instance, although we think the man "has no right to the advantage of the mistake after hav- "ing received the money, the order is final." And he warned others that they would not obtain discharge on such ground.

In re Franklyn, note to *Fisher* v. *Bull*, 5 Durnf. & East., 36, it was held that where a French crown had been paid, which would be no payment at all (I Tidd Pr., 382), the prisoner having accepted it could not obtain the discharge by reason thereof.

From these authorities it is evident that in construing the Lord's act, there was not the strict construction attributed to the English courts by the learned circuit judge.

As the Lord's act required *payment* on a certain day,

if that was held not to be essential, and payment one, two and three days *after* not necessarily ground for discharge, and acceptance of the tender a waiver of ground of discharge, certainly in this case, where *prepayment* is the only ground of complaint, and where the *prisoner accepted the board for the week complained of and for several succeeding weeks* (Rec., 46), there was no ground for discharge.

VI.

IN ANY EVENT, THE PRISONER HAD NOT COMPLIED WITH THE CONDITIONS WHICH THE ILLINOIS STATUTE MAKES PRECEDENT TO DISCHARGE UNDER IT.

On March 22, 1872, the legislature of Illinois passed a law entitled "Judgments, Decrees and Executions." This law went into force July 1, 1872. (Session Laws, 1871–1872, p. 505.) This act was incorporated *verbatim et literatim* into the Revised Statutes of Illinois of 1874, and appears as chapter 77 thereof.

By section 5 of that act (Chap. 77), it is provided that:

"No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum* (*respondendum*) as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors."

The judgment in this case against Rudolph Deimel, the defendant in error, and Joseph Deimel, his co-defendant, was in tort, the declaration having charged the defendants with fraud, of which the court (Judge Bunn) found them guilty. (Rec., 1–4, 5–8.)

By Sec. 65 of the same act (Chap. 77), it is provided that:

"When a debtor shall be arrested by virtue of an execution against his body, he shall be conveyed to the "county jail of the county of the officer who made the "arrest and kept in safe custody until he shall satisfy the "execution or be discharged according to law. Immediately upon the arrest of the defendant the officer making the same shall give notice thereof to the plaintiff, "his agent or attorney, if in the county."

On *June 17, 1887*, the legislature passed an act as follows (Laws of Ill. of 1887, p. 213):

"An Act to amend section 65 of an act, entitled An "Act in regard to judgments and decrees and the manner "of enforcing the same by execution * * * approved "March 22, 1872; in force July 1, 1872.

"SEC. 1. Be it enacted by the People of the State of "Illinois, represented in the General Assembly: That "section 65 of an act entitled An Act in regard to judgments and decrees and the manner of enforcing the "same by execution and to provide for the redemption "of real estate sold under execution or decree; approved "March 22, 1872, in force July 1, 1872, be and the "same is hereby amended so as to read as follows: Section 65. When a debtor shall be arrested by virtue of "an execution against his body he shall be conveyed to "the county jail of the county, of the officer who made "the arrest and kept in safe custody until he shall satisfy "the execution or be discharged according to law. Immediately upon the arrest of the defendant the officer "making the same shall give notice thereof to the plaintiff, his agent or attorney, if in the county. (Up to this "point the new section is an exact repetition of the old "section.) *Provided* that no person heretofore or hereafter imprisoned under the provisions of this act shall "be imprisoned for a longer period than six months from "the date of arrest and all persons imprisoned under the "provisions of this act for the period of one or more "years from the time this act takes effect shall thereupon "be immediately discharged: *Provided, however, that no*

"*person shall be released from imprisonment under this* "*act* (Chap. 77) *who neglects or refuses to schedule in* "*manner and form as provided by an act concerning in-* "*solvent debtors*, approved April 10, 1872; in force July "1, 1872." (App., p. 20.)

The learned circuit judge (Rec., 24, 25) construes the words "released from imprisonment *under this act*," with reference to section 62 only of that act.

Section 62 is quoted in the opinion of the circuit court judge (Rec., 24) and has reference only to the issuance af a writ of *ca. sa.* where there has been a return of an ordinary execution and the judgment creditor or his agent makes an affidavit, setting forth that demand has been made upon the debtor for the surrender of his estate, and that the debtor has an estate not exempt from execution which he unjustly refuses to surrender, or the affidavit sets forth that since the cause of action accrued the debtor has fraudulently conveyed, concealed or otherwise disposed of a part of his estate, with a design to secure the same to his own use or defraud his creditors. Upon the making of such affidavit an order must be procured from the court directing the issuance of a *ca. sa.* and "upon the filing of such an affidavit with the clerk he shall issue an execution against the body of such *judgment debtor.*"

It is true that section 62 thus referred to has no application whatever to the the issuance of a *ca. sa.* where the action is one in tort. The circuit judge from that fact arrived at the erroneous conclusion, that the proviso contained in the law of 1887 amending section 65 of the law of 1872 had reference only to imprisonment as provided by said section 62 of that law. As a matter of fact, however, the circuit judge entirely overlooked section 5 (above quoted) of the law of 1872 and which provides for imprisonment in actions sounding in tort.

This court, in its opinion, *United States, ex rel. Deimel* v. *Arnold*, 69 Fed. Rep., 987, 992, did, however observe the existence of section 5 referred to. This court said:

"If, however, the writs against person and property "be regarded as governed by the same rule and required "to conform in the first instance to local legislation both "*have been authorized by the laws of Illinois from the* "*earliest days.* * * "

Section 5 of the law of 1872 was a part of the statute law of Illinois as early as 1825.

The act of 1825 was an act on judgments and executions and was supplemental an act of February 17, 1823 (Laws of 1822, p. 158), which concerned only imprisonment *for debt*. The section of the act of 1825, which corresponds to section 5 of the law of 1872, contains the following proviso:

"But nothing in this act contained nor in the said act "abolishing imprisonment for debt shall restrain or pre- "vent any execution being issued against the body of any "defendant *where the judgment shall have been obtained* "*for a tort or trespass* committed by said defendant." (Laws of 1824, p. 152.)

It will be borne in mind that the law containing section 62 and the original section 65 above referred to was approved *March 22, 1872*, and went into force July 1, 1872. The amendment to section 65 of that act was approved *June 17*, 1887, and went into force July 1, 1887. That amendment expressly provides "that no person shall be "released from imprisonment under this act (act of "March 22, 1872), who neglects or refuses to schedule "in manner and form as provided by an act concerning "insolvent debtors, approved April 10, 1872; in force "July 1, 1872."

Certainly section 5 is as much a part of "this act" as is section 62 contained therein. If now we turn to the act "An Act concerning insolvent debtors" above re-

ferred to, and according to which the schedule under the act of March 22, 1872, governing judgments and executions must be made, we find the following: The insolvent debtors act was passed April 10, 1872. The latter act was amended *June 14*, 1887. The insolvent debtors act, passed April 10, 1872, appears as chapter 72 of the Revised Statutes of Illinois of 1874. (App., p. 14.)

The insolvent debtors act provides by section 2 thereof as follows:

"When any person is arrested or imprisoned upon any "process issued for the purpose of holding such person to "bail *upon any indebtedness or for any civil action when "malice is not the gist of the action*, or when any debtor is "surrendered or committed to custody by his bail in any "such action, or *is arrested or imprisoned upon execution "in any such action*, such person may be released from "such arrest or imprisonment upon *complying with the "provisions of this act.*"

The words "the provisions of this act" just quoted certainly have reference to the insolvent debtors act and can have reference to no other act. As shown in the appendix (pp. 14–18) the insolvent debtors act is a complete code in itself, and makes comprehensive provision for the procedure governing the application for discharge and the discharge of an insolvent debtor.

The insolvent debtors act, viz: the law of April 10, 1872, was itself amended at the session of the legislature of Illinois, June 14, 1887.

Section 34 of the insolvent debtors act of *1872*, provides as follows:

"In any case where the defendant arrested upon final "process shall not be entitled to relief under the provisions "of this act, if the plaintiff will advance the jail fees and "board in manner hereinbefore provided, the defendant "may be imprisoned at $1.50 per day until the judgment

"shall be satisfied, and the officer making the arrest shall "indorse the execution, satisfied in full by imprison- "ment."

In other words, "in any case" where the County Court finds under the insolvent debtors act that the defendant is not entitled to a discharge, the defendant will work out the judgment at the rate of $1.50 per day. On June 14, 1887, three days before the amendment to the judgment and execution act was passed, the legislature adopted an amendment to said section 34 of the insolvent debtors act.

That amendment reads as follows:

"An Act to amend section 34 of an act entitled 'An Act "concerning insolvent debtors, approved April 1 1872; "in force July 1, 1872.

"SECTION 1. Be it enacted by the People of the State "of Illinois, represented in the General Assembly: That "section 34 of an an act entitled An Act concerning in- "solvent debtors; approved April 10, 1872; in force "July 1, 1872, be and the same is hereby amended so as "to read as follows: Section 34. In any case where the "defendant arrested upon final process shall not be entitled "to relief under the provisions of this act, if the plaint- "iff will advance the jail fees and board in manner here- "inbefo re provided, the defendant may be imprisoned at "$1.50 per day until the jndgment shall de satisfied and "the officer making the arrest shall indorse the execu- "tion 'satisfied in full by imprisonment' (up to this "point the language of the new section is identical with "that of the original section 34): *provided*, that no per- "son heretofore or hereafter imprisoned *under the pro- "visions of this act* (insolvent debtors act) shall be im- "prisoned for a longer period than six months from the "date of arrest, and all person imprisoned under the pro- "visons of this act for the period of six months or more "from the time this act takes effect, shall thereupon be "immediately discharged; *provided*, however, that no "person shall be released from imprisonment under this "act *who neglects or refuses to schedule* in manner and

"form as provided by this act." (Laws of 1887, p. 194.)

The proviso just quoted and contained in the amendment to section 34 of the insolvent debtors act, is like that contained in the amendment of section 65 of the judgment and execution act, as will appear from the following:

Amendment of June 14, 1887, of section 34 of insolvent debtors act:

"*Provided, however, that no per-*
"*son shall be released from impris-*
"*onment under this act who neg-*
"*lects or refuses to schedule in*
"*manner and form as provided by*
"*this act.*"

Amendment of June 17, 1887, of Sec. 65 of the judgment and execution act:

"*Provided, however, that no per-*
"*son shall be released from imprs-*
"*onment under this act who neglects*
"*or refuses to schedule in manner and*
"*form as provided by* An Act con-
"cerning insolvent debtors, ap-
"proved April 10, 1872; in force
"July 1, 1872."

There can, therefore, be no dispute as to which of these two statutes (insolvent debtors act and judgment and execution act) governs the question at present under discussion, for *both* require a schedule as a condition precedent to a discharge from imprisonment under their respective provisions. It would be quibbling to attempt to argue that there was a conflict between the provisions of these two acts; but even if such a conflict actually existed, the amendment to the judgment and execution act was passed June 17, 1887, or three days later than the amendment to the insolvent debtors act, and as the amendment to the former is the last utterance of the legislature on the subject, it would necessarily govern. There is, then, an express provision that no one imprisoned upon a *ca. sa.* shall be entitled to a discharge until he has scheduled and made an assignment as provided in sections 6 and 9 of the insolvent debtors act. (App., pp. 14-17.)

The learned circuit judge's construction would put a premium upon tort, and upon cases where malice is the

gist of the action. He discriminates in favor of these, and explicitly holds that in such actions the debtor is entitled to a release without scheduling and making an assignment; on the other hand, he holds that where the debtor is imprisoned as provided by section 2 of the insolvent debtors act "in any civil action when malice is not the "gist of the action, such prisoner cannot be released "'or discharged without complying with the provisions "of this act"' (Rec., 26), (insolvent debtors act), and which act provides for a sworn schedule and for an assignment for the benefit of creditors.

The circuit judge, to use his words, held that no schedule or assignment was necessary where a prisoner was was held "upon a *capias ad satisfaciendum* issued of "course on a judgment for tort in a case where malice is "the gist of the action" (Rec. 26), but that such a schedule is a prerequisite only when that writ is issued after the return of a *fi. fa.* pursuant to *section 62*, Chap. 77 (judgment and execution act); thus ignoring the provisions of *section 5* of the latter act, and also the provisions of the amendment passed June 17, 1887, amending section 65 of that act.

Where the learned judge finds the basis for this distinction, it is impossible to discover.

The prisoner in this case was not imprisoned under any writ authorized by chapter *72* (insolvent debtor's act). He was imprisoned under a writ authorized by section 5 of chapter *77* (judgment and execution act), and the 65th section of *that* chapter, as amended June 17, 1887, provides that:

"No person shall be released from imprisonment under *this* act who neglects or refuses to schedule in manner and form as provided by an act concerning insolvent debtors."

Defendant in error is attempting to escape and has been discharged under a provision of Chap. 72. But he was not confined by virtue of any writ or process authorized by any provision of Chap. 72. He seeks "*release* from "imprisonment under this act" (insolvent debtor's act), which expressly provides that "no person shall be released "from imprisonment under this act who neglects or re- "fuses to schedule in manner and form as provided by "this act."

Whatever the meaning of the phrase in Chap. 77 might be, it is clear that there is no doubt that a schedule is a prerequisite to a "release" under Chap. 72, and such is the release that Deimel asked below and was granted, *without having scheduled or made an assignment.* The learned circuit judge says (Rec., 26):

"There is no law authorizing him to schedule in the "County Court or elsewhere as a means of being dis- "charged from imprisonment, no law authorizing any "judicial officer to entertain or pass on any schedule "tendered by him." Is this so?.

Section 6 of chapter 72 affords full directions as to the manner of making a schedule, and section 34 of the same chapter requires every prisoner seeking discharge to schedule "in manner and form as provided in this act." The fallacy of restricting the requirement about scheduling in section 34 of chapter 72 *to prisoners held under section 62 of chapter 77*, is that *such* prisoners to obtain discharge under chapter 72 *are* required *by other sections* (sections 5, 6 and following, chap. 72) of that very chapter to schedule in the process of obtaining discharge. So that the restriction in section 34 would be entirely superfluous, if it referred to such prisoners only.

Again, what canon of construction permits the court to ignore the provisions of section 5 of chapter 77, and say

that prisoners held under that section need not schedule, even though the amendment of June 17, 1887, expressly makes such schedule a condition precedent to a discharge.

Again, chapter 72 clearly shows that the requirement as to a schedule extends to *all prisoners* to whom the provisions (sections 30, 31 and 32) as to board and jail fees apply.

For Sec. 33 which immediately follows those provisions (Appendix, p. 16), declares that:

"The discharge of any person under the foregoing pro-
"visions of this act, shall be no discharge or satisfaction
"of the demand, judgment or costs upon which he was
"arrested or imprisoned, *or any debt mentioned in such*
"*schedule*, but the same may be enforced against the
"property of such discharged person."

It is, therefore, beyond doubt that a schedule is a condition precedent, and recognized throughout the chapter, as a condition precedent, to discharge for non-payment of board by the creditor.

Why should the *tort feasor* have an immunity not granted to the contract debtor? Under the decision of the lower court, the former can retain his property (which may be many times the amount of the judgment), while the latter must make a schedule and assignment before being discharged.

It is said that the Lords act was the model of these Illinois statutes, and such appears to be the case. But under the Lords act there could be no discharge for failure to pay board, until the prisoner had made a schedule and assignment of his property. (See the summary of the provisions of the Lords act, *supra*, p. 51.)

In this connection it is to be noted that the decision of Judge Collins, relied upon by the Circuit Judge, was

decided *before the amendment* of both chapters 72 and 77, by which, in 1887, the requirement of the schedule and limitation of six months imprisonment were added to each of these chapters.

It is submitted that there is evident error in the order entered below, and that the error is one which destroys utterly all recourse against the discharged prisoner if such order remains unreversed. For if the Circuit Court had no jurisdiction, or if the state statute does not apply, or if the discharge should not have been granted until the prisoner had scheduled, there is an escape and no further remedy on the judgment.

It is respectfully prayed that the order of the Circuit Court be reversed.

Respectfully submitted.

T. A. Moran,
Levy Mayer,
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APPENDIX.

Section 914 *of the Revised Statutes of the United States, being a revision of section 5 of the Act to Further the Administration of Justice. Approved, June 1, 1872. 17 Stat. at Large, 197.*

"The practice, pleadings, and forms and modes of "proceeding in civil causes, other than equity and ad- "miralty causes, in the Circuit and District Courts, shall "conform, as near as may be, to the practice, pleadings, "and forms and modes of proceedings existing at the "time in like causes in the courts of record of the state "within which such Circuit or District Courts are held, "any rule of court to the contrary notwithstanding.

Section 916 of the Revised Statutes of the United States, being a revision of section 6 of the said act. Approved, June 1, 1872. 17 Stat. at Large, 197.

"The party recovering a judgment in any common-law "cause in any Circuit or District Court, shall be entitled "to similar remedies upon the same, by execution or "otherwise, to reach the property of the judgment "debtor, as are now provided in like causes by the laws "of the state in which such court is held, or by any such "laws hereafter enacted which may be adopted by gen- "eral rules of such Circuit or District Court; and such "courts may from time to time, by general rules, adopt "such state laws as may hereafter be in force in such "state in relation to remedies upon judgments, as afore- "said, by execution or otherwise."

Section 990 of Revised Statutes of the United States, being a part of an act, rearranged, which was approved March 2, 1867. 14 Stat. at Large, 543.

"No person shall be imprisoned for debt in any state, "on process issuing from a court of the United States,

"where, by the laws of such state, imprisonment for debt "has been or shall be abolished. And all modifications, "conditions and restrictions upon imprisonment for debt, "provided by the laws of the state, shall be applicable to "the process issuing from the courts of the United States "to be executed therein; and the same course of pro- "ceedings shall be adopted therein as may be adopted in "the courts of such state."

Section 991 of Revised Statutes of the United States, being the remainder of said act, rearranged, which was approved March 2, 1867. 14 Stat. at Large, 543.

"When any person is arrested or imprisoned in any "state on mesne process or execution issued from any "court of the United States in any civil action, he shall "be entitled to discharge from such arrest or imprison- "ment in the same manner as if he were so arrested and "imprisoned on like process from the courts of such state. "The same oath may be taken, and the same notice "thereof shall be required as may be provided by the laws "of such state, and the same course of proceedings shall "be adopted as may be adopted in the courts thereof. "But all such proceedings shall be had before one of the "commissioners of the Circuit Court for the district "where the defendant is so held."

Section 992 of Revised Statutes of the United States.

"Persons imprisoned on process issuing from any court "of the United States in civil actions, as well as the suit "of the United States as at the suit of any person, shall "be entitled to the same privileges of the yards of the re- "spective jails as persons confined in like cases on pro- "cess from the courts of the respective states are entitled "to, and under the like regulations and restrictions."

ACT OF SEPTEMBER 25, 1789. 1 Stat. at Large, U. S., 93,

"*An act to regulate process in the courts of the United "States.*"

"SEC. 2. And be it further enacted, that until fur-

"ther provision shall be made, and except where by this "act or other statutes of the United States is otherwise "provided, the form of writs and executions, except "their style, and modes of process and rates of fees, ex- "cept fees to judges, in the Circuit and District Courts, "in suits at common law, shall be the same in each state "respectively, as are now used or allowed in the Supreme "Courts of the same. And the forms and modes of pro- "ceedings in cases of equity, and of admiralty and mari- "time jurisdiction, shall be according to the course of the "civil law; and the rates of fees the same as are or were "last allowed by the states respectively in the court ex- "ercising supreme jurisdiction in such causes. Provided, "that on judgments in any of the cases aforesaid where "different kinds of execution are issuable in succession, "a *capias ad satisfaciendum* being one, the plaintiff shall "have his election to take out a *capias ad satisfaciendum* "in the first instance, and be at liberty to pursue the "same until a tender of the debt and costs in gold or sil- "ver shall be made."

ACT OF MAY 8, 1792. 1 Stat. at Large, U. S., 276.

"Chap. XXXVI, I Statutes at Large, 276:

"*An Act for regulating the processes in the courts of "the United States and providing compensation for the "officers of the said courts and for jurors and witnesses.*

"SEC. 2. *And be it further enacted*, That the forms "of writs, executions and other processes, except their "style, and the forms and modes of proceeding in suits "of those of common law shall be the same as are now "used in the said courts respectively in pursuance of the "act entitled: 'An Act to regulate processes in the courts "'of the United States,' in those of equity and in those "of admiralty and maritime jurisdiction, according to "the principles, rules and usages which belong to courts "of equity and to courts of admiralty respectively, as "contradistinguished from courts of common law; except "so far as may have been provided for by the act to es- "tablish the judicial courts of the United States, subject, "however, to such alterations and additions as the said "courts respectively shall, in their discretion, deem ex-

"pedient, or to such regulations as the Supreme Court "of the United States shall think proper from time to "time, by rule, to prescribe to any Circuit or District "Court concerning the same: *Provided*, that on judgments "in any of the cases aforesaid where different kinds of "executions are issuable in succession, *a capias ad.* "*satisfaciendum* being one, the plaintiff shall have his "election to take out a *capias ad satisfaciendum* in the "first instance."

ACT OF JANY. 6, 1800, Chap. IV., 2 Stat. at Large, p. 5.

"*An Act for the relief of persons imprisoned for debt.*

"SECTION 1. *Be it enacted by the Senate and House* "*Representatives of the United States of America, in* "*Congress assembled*, That persons imprisoned on process "issuing from any court of the United States, as well at "the suit of the United States as at the suit of any per- "son or persons in civil actions, shall be entitled to like "privileges of the yards of limits of the respective gaols, "as persons confined in like causes on process from the "courts of the respective states are entitled to, and "under the like regulations."

"SEC. 2. *And be it further enacted*, That any person "imprisoned on process of execution issuing from any "court of the United States in civil actions, except at "the suit of the United States, may have the oath or "affirmation hereinafter expressed, administered to him "by the judge of the District Court of the United States "within whose jurisdiction the debtor may be confined; "and in case there shall be no district judge residing "within twenty miles of the gaol wherein such debtor "may be confined, such oath or affirmation may be ad- "administered by any two persons who may be com- "missioned for that purpose by the district judge, the "creditor, his agent or attorney, if either live within "one hundred miles of the place of imprisonment or "within the district in which the judgment was ren- "dered, having had at least thirty days previous no- "tice by a citation served on him, issued by the dis- "trict judge, to appear at the time and place therein "mentioned, if he see fit to show cause why the "said oath or affirmation should not be adminis-

"tered. At which time and place, if not sufficient cause "in the opinion of the judge (or the commissioners ap- "pointed as aforesaid), be shown, or doth from examina- "tion appear to the contrary, he or they may, at the re- "quest of the debtor, proceed to administer to him the "following oath or affirmation, as the case may be, viz: "'You solemnly swear (or affirm) that you have no es- "tate, real or personal, in possession, reversion or re- "mainder, to the amount or value of thirty dollars, other "than necessary wearing apparel; and that you have "not, directly or indirectly, given, sold, leased, or other- "wise conveyed to, or intrusted any person or persons "with all or any part of the estate, real or personal, "whereof you have been the lawful owner or possessor, "with any intent to secure the same, or to receive or ex- "pect any profit or advantage therefrom, or to defraud "your creditors, or have caused or suffered to be done "anything else whatsoever, whereby any of your credit- "ors may be defrauded.' Which oath or affirmation be- "ing administered, the judge or commissioners shall cer- "tify the same under his or their hands to the prison- "keeper, and the debtor shall be discharged from his im- "prisonment on such judgment, and shall not be liable "to be imprisoned again for the said debt, but the "judgment shall remain good and sufficient in law, and "may be satisfied out of any estate which may then, or "at any time afterwards, belong to the debtor. And "the judge or commissioners, in addition to the cer- "tificate by them made and delivered to the prison- "keeper, shall make return of their doings to the Dis- "trict Court, with the commission, in cases where a com- "mission hath been issued, to be kept upon the files and "record of the same court. And the said judge, or "commissioners, may send for books and papers, and have "the same authority as a court of record, to compel the "appearance of witnesses, and administer to them, as "well as to the debtor, the oaths or affirmations neces- "sary for the inquiry into, and discovery of the true state "of the debtor's property, transactions and affairs.

"SEC. 3. *And be it further enacted*, That when the "examination and proceedings aforesaid, in the opinion "of the said judge or commissioners, cannot be had with

"safety or convenience in the prison wherein the debtor "is confined, it shall be lawful for him or them, by war- "rant under his or their hand and seals, to order the "marshal or prison-keeper to remove the debtor to such "other place convenient and near to the prison as he or "they may see fit; and to remand the debtor to the same "prison, if upon examination or cause shown by the "creditor, it shall appear that the debtor ought not to be "admitted to take the above recited oath or affirmation, "or that he is holden for any other cause.

"SEC. 4. *And be it further enacted*, That if any per- "son shall falsely take any oath or affirmation, authorized "by this act, such person shall be deemed guilty of per- "jury, and upon conviction thereof, shall suffer the pains "and penalties in that case provided. And in case any "false oath or affirmation be so taken by the debtor, the "court, upon the motion of the creditor, shall recommit "the debtor to the prison from whence he was liberated, "there to be detained for the said debt, in the same "manner as if such oath or affirmation had not been "taken.

"SEC. 5. *And be it further enacted*, That any per- "sons imprisoned upon process issuing from any court of "the United States, except at the suit of the United "States, in any civil action, against whom judgment has "been or shall be recovered, shall be entitled to the privi- "leges and relief provided by this act, after the expira- "tion of thirty days from the time such judgment has "been or shall be recovered, though the creditor should "not within that time sue out his execution and charge "the debtor therewith.

"Approved January 6, 1800."

ACT OF MAY 19, 1828, *4 Stat. at Large, 278.*

"Chap. LXVIII. *An Act further to regulate process- "es in the courts of the United States.*

"Be it enacted * * * *

"That the forms of mesne process * * * and modes "of proceeding in suits in the courts of the United "States * * * * shall be the same in each of the said "states respectively, as are now used in the highest "court, of original and general jurisdiction of the "same * * * *

"Sec. 3. And be it further enacted, that writs of "execution and other final process issued on judgments "and decrees rendered in any of the courts of the "United States, *and the proceedings thereupon* shall be "the same, except their style, in each state, respectively, "as are now used in the courts of such states * * * *

GENERAL LAWS MASSACHUSETTS 1855, p. 90, CXXX.

Act passed May 21, 1855.

SECTION 1. "Imprisonment for debt is hereby for- "ever abolished in Massachusetts.

SEC. 2. "Willful and intentional neglect to apply pro- "perty, not exempt from attachment on execution, to the "payment of a debt, shall be considered as a fraud, and "shall be punished as hereinafter provided.

SEC. 3. "If the plaintiff in any suit, or any person "in his behalf, after execution is issued amounting to "twenty dollars, exclusive of costs, and while twenty "dollars, exclusive of costs, remains uncollected thereon, "shall make oath, and prove to the satisfaction of any "justice of any court of record, or of any police justice, "judge of probate, commissioner of insolvency, or master "in chancery:

"*First.* That he believes, and has reason to believe, "that the defendant has property not exempt from being "taken on execution which he does not intend to apply "to the payment of the plaintiff's claim; or

"*Second.* That since the debt was contracted, or the "cause of action accrued, the debtor has fraudulently "conveyed or concealed, or otherwise disposed of his "estate, or some part thereof, with a design to secure the "same to his own use, or to defraud his creditors; or

"*Third.* That since the debt was contracted, or the "cause of action accrued, he has hazarded and paid money "or other property, to the value of one hundred dollars "or more, in some kind of gaming prohibited by the "laws of the commonwealth; or

"*Fourthly.* That he has willfully expended his lands "and estate, or some part thereof, for the purpose of en- "abling himself to swear that he has not any estate to the "amount of twenty dollars, except such as is exempted "from being taken on execution; or

"*Fifthly.* If the action was founded on contract, "that the debtor contracted the debt with an intention "not to pay the same, the plaintiff's affidavit shall be in- "dorsed upon the execution, with the certificate of the "magistrate that he is satisfied that there is reasonable "causes to believe that the charges, or either of them, "specifying which, are true—then, and not otherwise, "the execution may be served, by the arrest of the body. "If the execution be issued by a justice of the peace, the "affidavit may be made before him, and the certificate "granted by him, and the form of execution shall be the "same as now.

"SEC. 4. The defendant, when arrested, shall be car- "ried before some one of the magistrates mentioned in "section three, or, if none such can be conveniently "found, before some justice of the peace and of the "quorum, who shall, if the defendant desires it, give no- "tice to the creditor, his agent or attorney, that the de- "fendant desires to take the oath for the relief of poor "debtors; and such notice shall be served upon said "plaintiff, agent or attorney, by giving him an attested "copy thereof, or by leaving such copy at his usual "place of abode, allowing not less than one hour before "the time appointed for examination, and allowing time "for travel at the rate of not less than one day for every "twenty-four miles travel. * * *

"SEC. 5. [Further as to service and form of notice.]

"SEC. 6. [Provision for verbal or written examina- "tion as to charges before magistrate, form of oath to "be taken by debtor, and form of certificate of dis- "charge.]

"Upon taking this oath the debtor shall be discharged "from arrest, and shall be forever exempt from arrest "on the same execution, or upon any process founded on "the judgment. If the oath be refused, a certificate "thereof shall be indorsed on the execution, and the "debtor shall be conveyed to jail by the officer, and be "there kept until the execution shall be satified, or until "he shall be released by the creditor, or until he shall "have given notice in the manner now provided by law, "and shall have taken the oath for the relief of poor "debtors. * * *

"SEC. 8. When either of the charges named in the "third section of this act, numbered second, third, "fourth and fifth, shall be made as therein provided, or "whenever the creditor, or any one in his behalf, shall at "any time, pending the examination of the debtor, file "such charges, or any one of them, the debtor may plead "guilty or not guilty; and the same proceedings shall be "had, and the same sentence may be passed, as provided "by the ninety-eighth chapter of the Revised Statutes.

"SEC. 9. [Provisions for release on recognizance pending examination.]

"SEC. 10. The debtor, as soon as he is arrested, shall "be informed by the officer of all his rights under his act, "and he shall have reasonable time to procure sureties "before being carried before the magistrate.

"SECS. 11 and 13. [Similar provisions as to *mesne* "*process* in actions on contracts.]

"SEC. 13. If any person arrested on execution shall, "after such arrest, misspend or misuse goods, effects or "credits to the amount of forty dollars, not exempt from "being taken on execution, but which cannot be attached "by ordinary process of law, or so much thereof as is "equal to the sum for which he is committed, without "having offered the same to the arresting creditor in sat-"isfaction of his debt, such defendant shall be refused the "oath for the relief of poor debtors.

SEC. 14. [Provisions for fees of magistrates.]

"SEC. 15. No arrest shall be made after sunset, un-"less specially authorized by the magistrate making the "certificate. And no woman shall be arrested in any civil "process except for tort."

Mississippi.

Act on Executions and on Insolvent Debtors.

Act of June 22, 1822, pages 625 to 659, Howard & Hutchinson's Statutes of Mississippi.

Sections 1 to 26 deal exclusively with the forms of writs, and levy upon and sale of real and personal property.

Sec. 26. Bonds for keeping prison bounds.

Secs. 28 to 34 provide for the administration of the estate assigned by the debtor who schedules.

Sec. 35. *Creditor liable for debtor's prison fees.* Debtor afterwards liable to the creditor for the same.

(The full text of this section is as follows:)

"Where such insolvent person shall not be able to satisfy or pay the ordinary prison fees, sheriff or jailer may demand and receive of the party or parties at whose suit such insolvent person shall be imprisoned, all such fees as shall become due until such creditor shall agree to release such prisoner; and if the creditor, upon notice given to him or her, his or her attorney or agent, shall refuse to give security to the sheriff or jailer for the payment of such prison fees, or shall fail to pay the same when demanded, such sheriff or jailer shall discharge such debtor out of prison. Provided, *nevertheless*, that such insolvent prisoner shall be afterwards liable to the action of the creditor to recover such fees, and such creditor shall and may, notwithstanding his consent to the releasing such prisoner, at any time afterwards sue out a *scire facias*, to have a new execution against the lands and tenements, goods and chattels of such prisoner, in case he or she shall afterwards become possessed of any."

SEC. 36. Prison fees to be paid by the creditor at whose suit debtor is first taken.

SEC. 37. Persons in custody on original or mesne process, entitled to the provisions as to insolvent debtors.

Proviso.

SEC. 38. *Distringas detinue* may be superseded as to the specific thing.

SEC. 38. Persons imprisoned for fines, etc., discharged on taking the oath of insolvency, not if imprisonment is imposed as punishment.

SEC. 40. Executions against principal and surety to be levied on the property of the principal first.

Proviso.

SEC. 41. Proceedings against officers failing to return executions or attachments.

SEC. 42. Proceedings against officers for retaining money collected.

SEC. 43. Fines on executions, etc., of sheriffs, to effect only estates.

SEC. 44. Officer not to return execution without noting how he has executed same unless directed.

SEC. 45. On the death of officer before the sale of property taken in execution, a *venditioni exponas* may issue.

SEC. 46. Proceedings when the representatives of the officer neglect to deliver the property.

SEC. 47. When execution shall issue to any county in which the creditor does not reside he shall appoint an agent in that county.

(The text of this section in full is as follows):

"AND WHEREAS, it is unreasonable that sheriffs should "be obliged to go out of their counties to give notice to "creditors at whose suit any person may be in the custody "of such sheriff, or to pay money levied by execution,

"Be it therefore further enacted, that where any exe- "cution shall be delivered to the sheriff or other proper "officer of any other county than that where any credi- "tor resides, such creditor shall name some person in the "county where the execution is to be levied to be his, "her or their agent for the particular purpose "of receiving from the sheriff or other officer "any notices which may be necessary relating there- "to; and payments made and notices given to such "agent shall be as effectual as if made or given to the "creditor; and if any creditor shall fail to appoint such "agent no judgment shall be entered against the sheriff or "other officer for the non-payment of money in such execu- "tion unless a demand thereof shall have been first made "of such sheriff or other officer in his county by the cred- "itor or some other person having written authority from "him; or in case of failure in appointing such agent, shall "the sheriff or other officer or prisoner be obliged to give "notice previous to the discharge of said prisoner, either "for want of security for his prison fees or upon his "taking the oath of an insolvent debtor, but such prisoner "shall be discharged in those cases respectively, without "notice to be given to the creditor so failing."

SEC. 48. Officer to execute deeds for land sold.

SEC. 49. Clerks to keep a docket for execution.

SEC. 50. Nothing in this act to extend to distresses for rent.

SECS. 51 to 59, regulate the accounts and collection and disbursements by officers merely.

Process against prisoners who have escaped; return of process upon retaking the prisoner.

Proceedings thereon.

SEC. 60. Mode of proceedings against prisoners escaping from the prison house.

SEC. 61. Officer not liable unless the prisoner escape by his consent or negligence, or unless he neglected to make immediate pursuit.

Debt may be maintained against officer suffering debtor in execution to escape; private persons suffering criminals in their custody to escape.

ACT OF JUNE 13, 1822, OF MISSISSIPPI.

(*Full text of this act is as follows*):

"WHEREAS, by a resolution of the Senate and House "of Representatives of the U. S. of America, in Con- "gress assembled, it has been recommended to the leg- "islatures of the several states, to pass laws making it "expressly the duty of the keepers of their jails to re- "ceive and safely keep therein all prisoners committed "under the authority of the U. S. until they shall be dis- "charged by due course of the laws thereof, under the "like penalties as in the case of prisoners committed un- "der the authority of such states, respectively; the U. "S. to pay for the use and keeping of such jails at the "rate of 50c. per month for each prisoner that shall under "their authority be committed thereto, during the time "such prisoner shall be confined therein, and also to sup- "port such of said prisoners as shall be committed for "offenses, and whereas, it is just and reasonable to aid "the U. S. herein on the terms aforesaid, until other "provision shall be made in the premises,

"Be it therefore enacted by the Senate and House of "Representatives of the State of Mississippi, and General "Assembly convened, that all sheriffs, jailers, prison "keepers, and their and each of their deputies within this "state, to whom any person or persons shall be sent com- "mitted, by virtue of legal process issued by or under "the authority of the United States, shall be and they "are hereby enjoined and required to receive such pris- "oners into custody and to keep the same safely until

"they shall be discharged by due course of law; and that "all such sheriffs, jailers, prison keepers and their depu- "ties offending in the premises, shall be liable to the same "pains and penalties, and the parties grieved shall be en- "titled to the same remedies against them or any of them "as if such prisoners had been committed to their cus- "tody by virtue of legal process issued under the au- "thority of this state. The sheriff or jailer to whose "custody any prisoner shall be committed under the pro- "visions of this act, shall be authorized to require of the "marshal of the district, his deputy or other officer, the "fulfillment of the proposals of the general government "with regard to rent and sustenance at least quarter "yearly in all cases, and in case of the discharge of a "prisoner from custody, at the time of his discharge, it "shall be the duty of the sheriff or jailer, to furnish the "marshal with a regular statement of charges certified on "oath, together with the receipts and vouchers usual and "and necessary in making out his returns to the proper "department of the general government."

Chapter 72 Revised Statutes, Illinois.

Being an "Act concerning insolvent debtors." Approved April 10, 1872. Section 34 amended so as to require schedule, June 14, 1887. Laws 1887, p. 194.

Section 1. "Be it enacted by the People of the State "of Illinois, represented in the General Assembly. That "the County Courts shall have *exclusive* original jurisdic- "tion in their respective counties in *all* applications for "discharge from arrest or imprisonment *under the pro- "visions of this act*, and shall be held to be always open "and in session for the hearing of such applications."

Sec. 2. Provides that where any person is arrested upon mesne or final process, if malice is not the gist of the action, he may be discharged upon complying with the various provisions of the act.

SEC. 3. Provides that when any prisoner wishes to be discharged "under the provisions of this act," he shall give notice to the creditor or his attorney, or to the officer who made the arrest.

SEC. 4. "At the time appointed in such notice, it "shall be the duty of the officer in whose custody the "debtor shall be, to convey him before the judge of the "County Court of the county in which the debtor is ar- "rested or imprisoned." (R. S. 1845, p. 282, Sec. 3.)

SEC. 5. "When any debtor is arrested or imprisoned "for debt upon charge of fraud, or upon execution on "the charge of refusal to surrender his estate for the "payment of any judgment, he shall be entitled, upon "giving notice, as provided in section 3 of this act to "have the question, whether he is guilty of such fraud, "or has refused to surrender his estate, tried by a jury "who may be summoned, tried and selected for that pur- "pose."

SEC. 6. "When a debtor is brought before the judge "of the County Court, *and is not discharged pursuant to "the preceding section*, the judge shall require of him, a "full, fair and complete schedule of all his estate, real "or personal, including money, notes, bonds, bills, ob- "ligations and contracts for money or property of "any and every description or kind, name or "nature whatsoever, together with a true and per- "fect *account of all the debts* which he shall or "may be owing at the time, and subscribe the following "oath or affirmation, to wit": (Form of oath as to truth and completeness of schedule and list of debts.)

SEC. 7. Provision that creditor may contest schedule.

SEC. 8. Provision for adjournment and release of prisoner on bail.

SEC. 9. Provision, if schedule is approved, for appointment of assignee, and assignment, and for setting aside exemptions to debtor.

SEC. 10. "Such assignment shall absolutely vest in "such assignee all the interest of such debtor in and to

"the estate so assigned, for the use of the creditors of "such debtors." * * *

SEC. 11. Provision for discharge of prisoner after assignment.

SEC. 12. Provision for release of prisoner by officer.

SEC. 13. Assignment to be recorded.

SEC 14 to 29 inclusive. Provisions for administration of assigned estate..

"SEC. 30. In all cases where any person is committed "to the jail of any county upon any writ (of) *capias ad* "*respondendum* or *capias ad satisfaciendum* issued in "any suit, it shall be the duty of the creditor in such "writ to pay the keeper of the jail, or sheriff, his fees "for receiving such person, and his board for one week "at the time the debtor is committed to jail and before "the jailer shall be bound to receive the debtor, and in "default of such payment, the debtor may be discharged: "*Provided*, the officer having such debtor in charge, shall "give reasonable notice to the creditor, or his agent or "attorney, if within the county, that such debtor is "about to be committed to jail on such writ.

"SEC. 31. Should the debtor be detained in jail under "such writ for more than one week, it shall be the duty "of the creditor, at the commencement of each week, *to* "*advance* to such jailer the board of the debtor for the "succeeding week, and in default of such payment in ad- "vance, the debtor may be discharged by such jailer. In "case the debtor shall not be detained in such jail for any "week for which his board may have been paid in ad- "vance, the jailer shall return to the creditor, or his "agent or attorney, the amount so advanced for, and un- "exhausted in boarding."

"SEC. 32. The amount paid by any creditor (under "the provisions of this act) to the jailer, shall be indorsed "by the same on the writ on which the debtor was com- "mitted, and shall be charged against and collected of the "debtor as part of the costs in the suit in which the writ "issued."

"SEC. 33. The discharge of any person under the "foregoing provision of this act, shall be no discharge or

"satisfaction of the demand, judgment or costs upon "which he was arrested or imprisoned, or any debt men- "tioned in such schedule, but the same may be enforced "against the property of such discharged person."

"SEC. 34. In any case where the defendant arrested "upon final process shall not be entitled to relief under "the provisions of this act, if the plaintiff will advance "the jail fees and board in manner hereinbefore provided, "the defendant may be imprisoned at one dollar and "fifty cents per day, until the judgment shall be satisfied, "and the officer making the arrest shall indorse the exe- "cution 'satisfied in full by imprisonment': *Provided*, "that no person heretofore or hereafter imprisoned under "the provisions of this act, shall be imprisoned for a "longer period than six months from the date of arrest; "and all persons imprisoned under the provisions of this "act for the period of six months or more at the time "this act takes effect, shall thereupon be immediately "discharged, *Provided, however, that no person shall be "released from imprisonment under this act who neglects "or refuses to schedule in manner and form as provided "by this act.* (As amended June 14, 1887. L. 1887, "p. 194.")

"SEC. 35. Any person who shall be convicted of tak- "ing a false oath in any proceeding under this act, shall "be deemed guilty of willful perjury, and on conviction "shall suffer the pains and penalties enforced by law "therefor."

CHAPTER 75, REVISED STATUTES ILLINOIS.

Being "An Act to revise the laws in relation to jails "and jailers," approved March 3, 1874.

SECTION 1. A jail to be kept in each county.

SEC. 2. "The sheriff of each county in this state shall "be the keeper of the jail of the county, and have the "custody of all prisoners in such jails."

SEC. 3. He may appoint assistants.

SEC. 4. "The keeper of the jail shall receive and con-

"fine in such jail, *until discharged by due course of law*, "all persons who shall be committed to such jail *by any* "*competent authority.*"

SEC. 5. "The provisions of the preceding section "shall extend to persons detained or committed by au- "thority of the United States, as well as of this state."

SEC. 6. "The keeper of the jail shall be liable for fail- "ing to receive and safely keep all persons delivered un- "der the authority of the United States, to like pains "and penalties as for similar failures in the case of per- "sons committed under the authority of this state: *Pro-* "*vided, always,* the *marshal or person delivering such* "*prisoner shall pay*, or cause to be paid, for the use and "keeping of such jail, *at the rate of fifty cents per* "*month for each person that shall, under their authority,* "*be committed thereto, and also to the jailer such fees as* "*he would be entitled to for like services rendered, in vir-* "*tue of the existing laws of this state*, during the time "such prisoner shall be therein confined, and, moreover, "*shall support* such of the said prisoners as shall be com- "mitted for offenses." (R. S. 1845, 9.297, Sec. 10.)

SEC. 7. Calendar of imprisonments to be kept.

SEC. 8. Report to court of prisoners held.

SEC. 9. Coroner may imprison sheriff.

SEC. 10. Provision for using jail of another county.

SEC. 11. Provision for separating debtors from criminals, females from males, and minors from notorious criminals.

SEC. 12. When jail is insufficient report to county board.

SEC. 13. Provision for guard.

SEC. 14. Removal in case of disease.

SEC. 15. Removal in case of fire.

SEC. 16. "*The keeper of the jail shall furnish each* "*prisoner, daily, with as much clean water as may be* "*necessary for drink and personal cleanliness, and serve*

"*him three times a day with wholesome food, well cooked* "*and in sufficient quantity.*"

SEC. 17. Provision that all prisoners, except felons, shall have permission to obtain food and clothes from outside of the jail.

SEC. 18. Liquor forbidden.

SEC. 19. "*The keeper of the jail shall furnish neces-* "*sary bedding, clothing, fuel and medical aid for all* "*prisoners under his charge, and keep an accurate ac-* "*count of the same.*"

SEC. 20. Jail to be kept clean.

SEC. 21. Toilet.

SEC. 22. Personal cleanliness.

SEC. 23. Penalties.

SEC. 24. "The cost and expense of maintaining and "furishing the jail of each county, *and of keeping and* "*maintaining the prisoners thereof, except as otherwise* "*provided by law, shall be paid from the county treasury,* "the account thereof being first settled and allowed by "the county board."

SEC. 25. Charges where imprisonment is in another county.

SEC. 26. Grand jury to inspect jail.

SECS. 27 AND 28. Court to oversee grand jury and inquire into condition of jail.

RESOLUTION OF CONGRESS. *1 Stat. at Large, p. 96.* (*Approved September 23, 1789.*)

No. 2. *Resolved, Etc.*, "That it be recommended to the "legislature of the several states to pass laws, making it "expressly the duty of the keepers of their gaols to re- "ceive and safe keep therein all prisoners committed un- "der the authority of the United States, until they shall "be discharged by due course of the laws thereof, under the "like penalties as in the case of prisoners committed under

"the authority of such states respectively; the United "States to pay for the use and keeping of such gaols, at "at the rate of 50 cents per month for each prisoner that "shall, under their authority, be committed thereto, "during the time such prisoners shall be therein confined, "and also to support such of said prisoners as shall be "committed for offenses." (See 1 Story Compiled Laws U. S., p. 70.)

CHAPTER 77, REVISED STATUTES OF ILLINOIS.

Being an "Act in regard to judgments and decrees, and "the manner of enforcing the same by execution," etc. Approved March 22, 1872.

All of the sections of this act, except those quoted or noticed, are immaterial, dealing with the lien of judgments, the definition of real estate and provision for sale and redemption thereof on execution, also levy upon and sale of personalty on execution, etc.

SEC. 5. "No execution shall issue against the body "of the defendant, except when the judgment shall have "been obtained for a tort committed by such defendant, "or unless the defendant shall have been held to jail upon "a writ of *capias ad respondendum*, as provided by law, "or he shall refuse to deliver up his estate for the bene-"fit of his creditors.

SEC. 65. "When a debtor shall be arrested by virtue "of an execution against his body, he shall be conveyed "to the county jail of the county of the officer who made "the arrest, and kept in safe custody until he shall sat-"isfy the execution or be discharged according to law. "Immediately upon the arrest of the defendant the offi-"cer making the same shall give notice thereof to the "plaintiff, his agent or attorney, if in the county; PRO-"VIDED that no person heretofore or hereafter "imprisoned under the provisions of this act, "shall be imprisoned for a longer period than "six months from the date of arrest. And all persons im-"prisoned under the provisions of this act for the period

"of one or more years at the time this act takes effect "shall thereupon be immediately discharged: *Provided*, "*however*, that no person shall be released from im- "prisonment under this act who neglects or refuses to "schedule in manner and form as provided by 'An Act "concerning insolvent debtors,' approved April tenth, "eighteen hundred and seventy-two, in force July first, "eighteen hundred and seventy-two. (As amended June "17, 1887. L. 1887, p. 213.)"

SECTION 830, REVISED STATUTES UNITED STATES.

"There shall be paid to the marshal * * * his "fees for the commitment or discharge of prisoners, * * *."

SECTION 5544, REVISED STATUTES UNITED STATES.

"Hereafter there shall be allowed and paid by the at- "torney general, for the subsistence of prisoners in the "custody of the marshal, * * * such sum only as "it reasonably and actually cost to subsist them."